(2) PFIZER HEART VALVES. Pfizer Pharmaceutical's anxiety about profits and sales of Bjork-Shiley Convexo-Concave heart valves may have overridden its concern about the lives of the patients involved. Thus, the company continued to market the valves four years after its inventor warned that such a course of action would be " 'tantamount to murder.' "[214] According to a December 1990 internal report by an FDA task group that investigated the misconduct of Pfizer and its Shiley subsidiary,

> "During the c/c [Convexo-Concave] valve's history, Shiley engaged in efforts to thwart FDA's intervention by untimely reports of [valve] fractures, unreported changes in quality control and manufacturing procedures, failure to correct known poor manufacturing procedures, and minimization of the overall problem through misleading and confusing communications to FDA and the medical community."[215]

By the time Pfizer finally pulled the valves from the market in 1986, more than 82,000 valves had been implanted worldwide, leaving those patients facing a terrible choice between dangerous replacement procedures and living with the knowledge of a potential defect.[216] By 1992, the valve defects had caused over 500 deaths and resulted in a class action settlement amounting to between $165 and $215 million, or $500,000 to $2 million per valve fracture.[217]

(3) HALCION. According to critics, Upjohn's own financial worries led it to withhold critical information from the FDA about dangerous side effects of Halcion, a prescription sleeping pill it manufactured and marketed.[218] The reported side effects ranged

---

Research (CTR) has been the primary advocate for the tobacco industry by producing studies that cast doubt on whether smoking is a health hazard and by disregarding or cutting off studies of its own that likely would have linked tobacco to health problems. *Id.* at 1. The CTR not only engages in research, but also lobbies for the tobacco industry with the assistance of public relations firms and cigarette manufacturers. *Id.* at 6.

214. *See* Greg Rushford, *Pfizer's Tell-Tale Heart Valve*, LEGAL TIMES, Feb. 26, 1990, at 1, 11 (noting that Swedish press reported in March 1982 that Bjork, product's inventor, was concerned about valves and suggested discontinuance of product).

215. BELL, *supra* note 209, at 167 (quoting FOOD & DRUG ADMIN., TASK GROUP REPORT ON BJORK SHILEY HEART VALVE AND SHILEY CORP. (1990)). *See generally* Christine Gorman, *Can Drug Firms Be Trusted?*, TIME, Feb. 10, 1992, at 42, 42 (discussing merit of fraud allegations against medical supply and drug manufacturers); Greg Rushford, *Pfizer's Smoking Gun?*, LEGAL TIMES, Feb. 6, 1992, at 1 (referring to internal corporate report, generated in response to FDA investigation, documenting that Pfizer "continued to produce and sell thousands of mechanical heart valves even after it knew of the structural weaknesses and sloppy manufacturing").

216. Barry Meier, *Flawed Heart Valve Is Presenting Patients with Harrowing Choice*, N.Y. TIMES, Mar. 14, 1992, § 1, at 1.

217. Milt Freudenheim, *Settlement Approved on Pfizer Heart Valves*, N.Y. TIMES, Aug. 20, 1992, at D4.

218. *See* Gina Kolata, *Maker of Sleeping Pill Hid Data on Side Effects, Researchers Say*, N.Y. TIMES, Jan. 20, 1992, at A1 [hereinafter Kolata, *Maker of Sleeping Pill*] (reporting critics' allegations that Upjohn concealed report from FDA demonstrating that Halcion could cause serious

from amnesia, paranoia, depression, and hallucinations to suicide and murder.[219] Although reports linking Halcion to adverse side effects first appeared in the medical literature in 1979 and concerns were confirmed by the medical community in the late 1980s, Upjohn, in its own studies, subtly concealed adverse findings, later claiming that any errors were merely "clerical" or "trivial."[220]

(4) LEAD. For decades, the lead industry has obstructed efforts undertaken by university researchers, consumer-, environmental- and child-protection public interest groups, and government agencies charged with public health and safety to learn about and prevent lead poisoning.[221] According to a recent report,

> Responses of the lead-producing and lead-using industries and their allies to the growing scientific case against lead constitute a useful case study in how established economic interests react to scientific evidence threatening their activities. Originally, . . . the bearers of adverse information were seemingly intimidated on an ad hoc, individual basis. When adverse information on lead exposure and human intoxication could not be contained "one-on-one" during the 1970s and 1980s, the industry abruptly took the tack of seeming cooperation. It cultivated a simulacrum of concerned, responsible "objectivity," expanded and established its

---

psychiatric side effects). Halcion is, or at least was, the "world's best selling sleeping pill," sold by Upjohn in the United States since 1983 and in markets in 89 other countries and representing some 8% of Upjohn's sales (approximately $200 million for the first three quarters of 1991). Gina Kolata, *F.D.A. Panel Recommends Keeping Sleeping Pill on Market*, N.Y. TIMES, May 19, 1992, at C3; Kolata, *Maker of Sleeping Pill*, *supra*, at A1.

219. *See* William Styron, *Prozac Days, Halcion Nights: Profits and Pills*, NATION, Jan. 4, 1993, at 1, 1 (detailing author's personal experiences with Halcion); *see also* Stein, *Our Man in Nirvana*, N.Y. TIMES, Jan. 22, 1992, at A21 (detailing similar negative experiences with Halcion). By way of example, a Utah woman who shot her mother eight times and then placed a birthday card in her hand claimed that Halcion caused her behavior. *The Price of a Good Night's Sleep*, N.Y. TIMES, Jan. 26, 1992, § 4, at 9. The woman not only avoided prosecution, but won an out-of-court settlement against Upjohn. *Id.* In another case, a jury awarded a family $1.8 million (later reduced) in a suit against Upjohn alleging that Halcion had caused a family member to turn violent and murder his best friend. *Id.*

220. Kolata, *Maker of Sleeping Pill*, *supra* note 218, at A1; *see* Joseph W. Moch, *Halcion: The Hotbed of Controversy Continues*, 15 TRIAL DIPL. J. 101, 103-04 (1992) (describing various studies of Halcion). A *Washington Post* editorial raised related questions:

> [A]s a slice of regulatory history, the Halcion story, like the story of breast implants, is a troubling one. How is it that some safety studies identified by the FDA as "pivotal" were conducted by a confessed fraud whom the agency had disqualified before the drug's approval? . . . How did Upjohn come to underreport adverse reactions? (The FDA is investigating this.) And what is one to make of continuing allegations that the manufacturer failed to give regulators complete information pertaining to safety and that the FDA in turn failed to review adequately the data in its possession?

The Halcion File, WASH. POST, May 21, 1992, at A24; *see also* Gorman, *supra* note 215, at 42 (discussing charge against Upjohn for falsifying evidence of Halcion's safety).

221. *See* Herbert L. Needleman, *Childhood Lead Poisoning: Man-Made and Eradicable*, 2 PSR Q. 130, 133 (1992) (noting that lead industry threatened researchers that claimed lead to be hazardous by attempting to prevent publication of their studies, threatening them with lawsuits, and alleging that their studies violated ethical standards).

> own research programs and conferences, and heavily intruded into the regulatory evaluation process itself.
>
> Science evolves, but it evolves imperfectly; in its early jerky thrusts at the truth of a matter, there is considerable uncertainty about research results, their meaning, and their consequences. The 1970s and early 1980s typified this period for lead as a scientific research topic, and industry exploited this uncertainty exhaustively and effectively. The multidefense industry position now seemed to say: Our experts don't agree that lead exposure has occurred, but if it has our experts don't agree that the exposure produces significant public health problems, but if it does our experts say it is not extensive enough in the population to worry about. Current industry strategy, having apparently given up on a science that continued to indict lead as a major health issue, apparently relies on economics and cost-effectiveness: Lead is too important an economic commodity to regulate; what's more, the costs of existing lead abatement are too high for the benefits.[222]

(5) AIR POLLUTION. The automobile industry attempted to suppress pioneering research on air pollution. In 1950, Arie J. Haagen-Smit, a professor of biochemistry at the California Institute of Technology, made what was then a novel discovery: air pollution from cars and oil refineries causes smog.[223] The oil and auto industries saw Haagen-Smit's research findings as a potential threat to their economic well-being and proceeded to try to debunk Haagen-Smit

---

222. Paul Mushak, *The Landmark Needleman Study of Childhood Lead Poisoning: Scientific and Social Aftermath*, 2 PSR Q. 165, 169 (1992) (reporting on landmark 1979 study on neurotoxic effects of low levels of lead on very young children). "Apparent" acceptance and "apparent" cooperation are not the only tactics followed by the lead industry.

> Given [the lead] industry's complex strategy, the [pioneering] Needleman study posed special difficulties. . . . Not surprisingly, the industry launched persistent assaults on the Needleman study. In the early 1980s, these included misrepresenting, via wide publicity, technical evaluation of the Needleman study by the EPA's advisory consultants. More recently, the industry has supported efforts of others attacking the Needleman results and Needleman personally. In this regard, suspicion of misconduct charges were filed against him. After an extended investigation of the charges by the University of Pittsburgh, Needleman was cleared on misconduct charges.

Id. (footnote omitted); *see* Herbert L. Needleman et al., *Deficits in Psychologic and Classroom Performance of Children with Elevated Denture Lead Levels*, 300 NEW ENG. J. MED. 689, 689 (1979) (reporting that children with high levels of exposure to lead did not score as well on intelligence test as children with lower lead levels); Joseph J. Palca, *Get-the-Lead-Out Guru Challenged*, 253 SCIENCE 842, 842 (1991) (discussing alleged misconduct in scientific study of effects of low-level lead on human development); Gary Putka, *Professor's Data on Lead Levels Cleared by Panel*, WALL ST. J., May 27, 1992, at B5 (reporting claim by Needleman's attorney that University of Pittsburgh investigators found no evidence of fraud in scientists' lead poisoning studies); *see also* Joseph Palca, *Panel Clears Needleman of Misconduct*, 256 SCIENCE 1389, 1389 (1992) (reporting that University of Pittsburgh panel cleared Needleman of charges of scientific misconduct).

223. Mark Thompson, *Fighting for Cleaner Air*, ATLANTIC, Sept. 1988, at 20, 23.

as a junk scientist.[224] To that end,

> The Stanford Research Institute, employed by one of the [oil] industry's trade associations, quickly claimed to have found fundamental flaws in Haagen-Smit's methods and conclusions. In 1953 the auto industry entered the arena, beginning its own research program on the ground that the situation was too obscure to assign blame.[225]

(6) CHOCOLATE. At times, corporate zeal to use captive "scientific research organizations" to hoodwink both unaffiliated scientists and the unassuming public takes on ludicrous dimensions. For example, the Princeton Dental Resource Center suggested to dentists that their patients eat chocolate as a way of fighting tooth decay.[226] Newsletters from this center reported that eating chocolate could possibly inhibit cavities.[227] What the newsletters failed to mention, however, was that the Princeton Dental Resource Center was financed almost entirely by Mars Inc., manufacturer of M&Ms and Snickers and Milky Way candy bars.[228] The newsletter also failed to explain that only one ingredient found in chocolate—cocoa—had been pegged by researchers as a possible cavity-fighting substance, because beneficial tannins could be isolated from the cocoa.[229] Any benefits in the case of chocolate candy, however, would be completely offset by ingredients like sugar.[230]

(7) THE MONEY LURE. More generally, for years both university researchers and government regulators have worried that the often cozy relationships between industries and industry-funded but ostensibly neutral research centers might be a bit too cozy, bordering on (or crossing over into) systematic fraud, deceit, and corruption.[231] Huber seems to be one of the few who is not concerned

---

224. *Id.* at 22-23.

225. JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY 7 (1977).

226. Barry Meier, *Report Touting Chocolate as Cavity-Fighter Derided*, BALTIMORE SUN, Apr. 15, 1992, at A1; *see* Calvin Trillin, *Exposing Chocolate Therapy*, ATLANTA J. & CONST., Apr. 27, 1992, at A13 (describing newsletter sent to dentists' offices extolling cavity-fighting properties of chocolate).

227. Meier, *supra* note 226, at A1.

228. Meier, *supra* note 226, at A1.

229. Meier, *supra* note 226, at A1.

230. Meier, *supra* note 226, at A1.

231. *See* Warren E. Leary, *Business and Scholarship: A New Ethical Quandary*, N.Y. TIMES, June 12, 1989, at A1 ("Scientists, administrators, and lawmakers are increasingly worried that the lure of money threatens to compromise the quality and conduct of scientific and medical research."); *see also* Barry I. Castleman & Grace E. Ziem, *Toxic Pollutants, Science, and Corporate Influence*, 44 ARCHIVES ENVTL. HEALTH 68, 68 (1989) (claiming that chemical manufacturers had significant influence over determination of threshold limit values that were used to develop ambient air quality standards for their chemicals); Barbara J. Culliton, *Biomedical Research Enters the Marketplace*, 304 NEW ENG. J. MED. 1195, 1196-97 (1981) (discussing factors contributing to growth of ties between academia and industry); David F. Noble & Nancy E. Pfund, *Business Goes Back to College*, 231 NATION 233, 251-52 (1980) (claiming that universities

about the relationship between industry and research centers. Huber is either completely oblivious to these connections or is completely indifferent to their import. Huber's lack of concern about the money lure that threatens to compromise the integrity of medical and scientific research is odd, given his obsession with arguing that plaintiffs' lawyers corrupt the experts they hire.[232] Huber's failure to note, let alone discuss, any of the above examples must be seen for what it surely is: bias. Such bias in the subjects Huber has chosen *not* to write about, combined with his distorted rendering of those events he *has* chosen to write about, as well as his unwillingness to provide any quantitative assessment of the junk science epidemic, means that Huber fails each of the three tests of good science and good scholarship that he sets out as appropriate for others.

III. HUBER'S DUBIOUS LEGAL ANALYSIS IN *GALILEO'S REVENGE*

In the concluding chapter of *Galileo's Revenge*, Peter Huber offers his solution to the problems he outlined in the earlier chapters. Unfortunately, Huber's prescription is no better than his diagnosis. His proposal for curing what he regards as the raging and ravaging

---

are influenced by industry and rejecting notion that industry funding is no different than government funding); Jeff Bailey, *Dueling Studies: How Two Industries Created a Fresh Spin on the Dioxin Debate*, WALL ST. J., Feb. 20, 1992, at 1 (attributing recent doubts as to danger of dioxins to public relations campaigns by paper and chlorine industries and recognizing lack of attention paid to research that considers dioxins to be extremely dangerous).

Blurring of the line between business and scholarship is hardly the only problem. *See* Lawrence K. Altman, *Study Says Drug Ads in Medical Journals Frequently Mislead*, N.Y. TIMES, June 1, 1992, at A1 [hereinafter Altman, *Drug Ads Frequently Mislead*] (asserting that pharmaceutical companies often provide misleading advertisements regarding safety and effectiveness of drugs); *Pushing Drugs to Doctors*, CONSUMER REP., Feb. 1992, at 87, 87-89 (reporting that drug companies employ sophisticated marketing techniques to sell their drugs to doctors); G. Pascal Zachary, *Many Journalists See a Growing Reluctance To Criticize Advertisers: They Say Some Newspapers, Suffering Tough Times, Are Softening Coverage*, WALL ST. J., Feb. 6, 1992, at A1 (noting that newspapers and magazines display increased aversion to screening out advertisements for deceptive claims or to publishing news that might offend advertisers).

232. For example, Huber posits: "Junk science is impelled through our courts by a mix of opportunity and incentive. 'Let-it-all-in' legal theory creates the opportunity. The incentive is money: the prospect that the Midas-like touch of a credulous jury will now and again transform scientific dust into gold." HUBER, GALILEO'S REVENGE, *supra* note 5, at 3. According to Huber, no one is immune from the trial lawyers' blandished lure: " 'You get a professor who earns $60,000 a year and give him the opportunity to make a couple of hundred thousand dollars in his spare time and he will jump at the chance' . . . ." *Id.* at 19 (citation omitted). Similarly, good scientists are hooked into becoming junk scientists:

> A witness may not work directly for a contingent fee, but the expert is a contingent player anyway, and he knows it. His continued employment today, and reemployment tomorrow, depends critically on the strength of the support he can supply. . . . He can earn hundreds of dollars an hour, hundreds of thousands a year. For all practical purposes, he is working on a contingency fee, though the contingent nature of his employment and compensation will always be angrily denied. Where have we seen this character before? In his employer's office. He is the spit and image of a trial lawyer.

Id. at 18, 20.

epidemic of junk science is as superficial as his analysis of what is wrong with the existing state of affairs: good science will only triumph, *can* only triumph, with the helping hand of "wise judges" who must make sure, through the reinvigoration of the *Frye* rule and other means, that "scientific bamboozlers" are not allowed to bamboozle the common folk who sit on juries.[233] Huber's nostrums cannot be taken seriously. Specifically, Huber completely distorts the historical significance of the "*Frye* rule" and its supposed past importance in combating "junk science" in civil lawsuits, and he totally ignores the traditional role of the jury in resolving factual issues.

*A. The Fictitious History of the "*Frye *Rule"*

Huber's oft-mentioned prescription for solving the junk science problem is quite simple: supplant the now-fashionable "let-it-all-in" philosophy supposedly embodied in the Federal Rules of Evidence with the once-fashionable "let-only-the-good-stuff-in" philosophy supposedly incarnated in the common-law *Frye* rule.[234] This course would fence off the courtrooms from the ivory-tower theorists who designed the existing rules of evidence that incorporate the "let-it-all-in" world view; the unsuspecting members of Congress who enacted statutory rules that embody that outlook; and the spineless judges who, heedless of their duties and of the overall needs of society, permit junk science into the courtroom.

Huber's description of the *Frye* rule, of how its elimination prompted the rise of junk science, and thus of how its rebirth would help destroy junk science, bears close examination. As will hereafter be noted, there is little truth in any of the very precise claims that Huber makes about *Frye*.

The prominence of the *Frye* rule in Huber's analysis of the legal roots of the current junk science problem is evident in chapter one of *Galileo's Revenge*. Huber asserts that in the "good old days" of evidence law, courts limited the roles of experts hired by the parties:[235]

> [T]he rules of evidence embodied the same cautious respect for

---

233. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 193, 223-25 (concluding that judicial search for most authoritative scientific evidence prevents fraudulent "snake-oil peddlers" from demeaning judicial process).

234. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 14-17, 201 (asserting that *Frye* rule represents best way to determine if expertise is based on objective experience).

235. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 13-17 (decrying desultory path down slippery slope toward junk science by recounting that where judges once applied stricter standards regarding expert witnesses, 18th-century America witnessed beginning of erosion of those standards, culminating in loose, junk science standards).

> tradition as did the liability rules themselves. Experts were not given a free hand to speculate; their function was to convey the consensus views of their profession. . . . If expert witnesses were unconstrained by professional tradition and consensus, malpractice was as likely to be promoted on the witness stand as deterred at the defense table. Once again, a balance had to be struck between the need to police incompetence outside the courtroom and the risk of rewarding incompetence within.[236]

Huber writes that it was in this context that the *Frye* rule emerged to do battle with junk science:

> In 1923 a federal appellate court issued a landmark ruling in *Frye v. United States* aimed at accommodating these competing concerns. Thereafter, federal courts, widely copied by the states, were bound by the *Frye* rule, which allowed experts into court only if their testimony was founded on theories, methods, and procedures "generally accepted" as valid among other scientists in the same field. In deferring to the scientific community, the rule conceded the courts' own limits. *Frye* marked a reasonable compromise between a populist rejection of all expertise and what was to follow, the equally populist view that experts are everywhere and there's no choosing among them.[237]

True, Huber notes that "[l]ike all verbal standards the *Frye* rule could be bent, and it sometimes was," for example, by "[c]harlatans of many stripes" who even in the time of *Frye* would "go through the motions of serious science," attempting to qualify their testimony by setting up their own societies committed to subjects such as whether "trace ambient pollutants cause narcolepsy."[238] "But *Frye* did at least serve a hortative purpose, stiffening the judge's spine and steeling his nerves when a brash scientific iconoclast presented himself at the courthouse. *Frye* held out the hope that, with the help of determined judges, the legal consensus would in time converge with the scientific one."[239] This thinking led Huber to the following conclusions:

> From 1923 until the mid-1970s, the *Frye* rule made some attempt to hold expert witnesses to [accepted standards and consensus norms]. Certainly not to anything better than mainstream scientific norms, but the rule did at least refer to competent science as defined by the consensus views of a profession. Under *Frye*, the expert witness could report only learning that was "generally accepted" in his scientific discipline. Negligence, incompe-

---

236. HUBER, GALILEO'S REVENGE, *supra* note 5, at 14.
237. HUBER, GALILEO'S REVENGE, *supra* note 5, at 14.
238. HUBER, GALILEO'S REVENGE, *supra* note 5, at 14.
239. HUBER, GALILEO'S REVENGE, *supra* note 5, at 14.

> tence, irresponsibility, reckless disregard for professional standards, and every other variation on professional malpractice were as unacceptable on the witness stand as they were anywhere else.[240]

In Huber's view, the downfall of the *Frye* rule led directly to the rise of junk science: "*Frye* held sway until the 1970s, when it collided with the high ambition of the Calabresians" and their pessimism about technology and its dangers.[241] "*Frye* seemed to give mainstream science the final word" on the apparent dangers of such technology, but "[i]t seemed utterly perverse to many in the legal community that the consensus views of the very professions causing all the problems might stand in the way of legal solutions. Viewed from any angle, *Frye* clearly threatened to cut short the great Calabresian search for cheap, wide-ranging control" of risks.[242] *Frye* was therefore targeted for elimination.[243]

> Lawyers couldn't change what mainstream science maintained, but they could decide whether mainstream science mattered. That is exactly what they did. Some courts candidly stopped screening experts altogether. Others simply created majorities by gerrymander, defining "scientific communities" narrowly and uncritically. One way or another, judges gave up on the possibility of drawing firm lines between serious science and junk. When the Federal Rules of Evidence were first codified in 1975, they made no mention of *Frye* whatsoever. Expert testimony would be allowed, thenceforth, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact." Mainstream scientific consensus didn't matter any more. Social engineering in the courtroom would find its support wherever convenient; any iconoclast whose views might prove "helpful" to the jury would be welcome in court.
>
> . . . .
>
> The academics (as academics are prone to do) have continued to debate *Frye*'s demise long after the debate has ceased to be of any practical importance. Some insist that *Frye* still lives; others that it is dead and buried; others that, dead or alive, *Frye* no longer makes any practical difference. But with *Frye* certifiably absent from the rules of evidence, the academics might as well be debat-

---

240. HUBER, GALILEO'S REVENGE, *supra* note 5, at 176-77.

241. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 15 (asserting that Calabresian lawyers changed standard on whether mainstream science had legal significance).

242. HUBER, GALILEO'S REVENGE, *supra* note 5, at 15.

243. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 15 (implying that objections to *Frye* rule arose from its threat to Calabresian control of expert witness standards and insinuating that *Frye* came under attack and was ignored in codification of Federal Rules of Evidence in 1975).

> ing the survival of Elvis Presley in the indubitably silent halls of Graceland. Whether or not *Frye* still lives, the conviction is gone, the music has died. Most courts have slouched toward what federal judge Patrick Higginbotham dubs the let-it-all-in approach to expert testimony. By the 1980s, countless courts had opened their doors wide to claims based on methods or theories not generally accepted as reliable by any scientific discipline.[244]

As would be expected, Huber identifies the resurrection of the *Frye* rule as a necessary part of any serious attempt to overcome the evils of junk science in the courtroom.[245] In chapter eleven of *Galileo's Revenge*, entitled "Stopping Points: Confronting Malpractice on the Witness Stand," Huber explains that the renewed use of the *Frye* test is integral to respecting "Science as Consensus,"[246] and to "Holding Witnesses to a Common Standard."[247] "[S]cience has changed profoundly since the days of Galileo," Huber explains, for "Galileo had limited opportunities to belong to a larger community of scientists."[248] Since the founding in 1660 of what eventually became London's Royal Society, "all science in the West has been built up through collegiality and consensus—and a concomitant decline in the role of the hermit scientist."[249] Modern science "is no longer linked to any single theory or result; it is a process of replication and verification, a search for consensus"; it "is not a solitary undertaking."[250]

Huber argues that "[t]he methods of science are so fundamentally different from those of litigation that scientific anarchy in court is inevitable if rules of evidence are not strictly maintained."[251] Therefore, he urges:

> [J]udges must rediscover rules of evidence consonant with the essential collegiality of modern science. Such rules are not self-evident, nor can they be implemented mechanically, nor will they work their intended effect in the hands of jurists who hold science itself in no real respect. But rules can be formulated, and even modest rules, if enforced with evenhanded conviction and some measure of faith in the scientific method, will make a positive difference.[252]

---

244. HUBER, GALILEO'S REVENGE, *supra* note 5, at 15-17.
245. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 204-06 (urging judges to take control of expert testimony in trials by preventing admission of testimony from "privileged interlopers" in favor of testimony from established experts).
246. HUBER, GALILEO'S REVENGE, *supra* note 5, at 194.
247. HUBER, GALILEO'S REVENGE, *supra* note 5, at 198.
248. HUBER, GALILEO'S REVENGE, *supra* note 5, at 194, 196.
249. HUBER, GALILEO'S REVENGE, *supra* note 5, at 196.
250. HUBER, GALILEO'S REVENGE, *supra* note 5, at 196-97.
251. HUBER, GALILEO'S REVENGE, *supra* note 5, at 197.
252. HUBER, GALILEO'S REVENGE, *supra* note 5, at 198.

As Huber explains, the view that science is defined by the community was the fundamental insight of the old *Frye* rule:

> *Frye* directed the focus away from the individual, whatever his credentials might be, and toward the scientific consensus. Define the relevant community whose consensus views should prevail. Then require expert witnesses to report not their own, personal views, but the consensus views of that community.
>
> Applying the test is not always simple; there will always be room for quibbling. Any definition of "the relevant scientific community" will be somewhat arbitrary. But despite what some lawyers maintain, it isn't terribly difficult to decide which community of scientists to consult on Bendectin, cerebral palsy, or sudden acceleration.[253]

Thus, under Huber's conception, the *Frye* rule was a tool that allowed judges to select the community of scientists who "know" the answer to a particular scientific question, and then to demand that each scientist testifying simply report the "consensus" of scientists on the issue at hand.[254] This is obviously an incredibly powerful tool for reining in the use of junk science. Under this standard, the only facts that can be "proved" are those that are accepted by a consensus of the scientific community favored by the judge.[255]

A telltale sign of the weakness of Huber's analysis is that throughout his extensive discussion of *Frye*, Huber provides no citations to support his version of the birth, growth, death, and possible new rise of the *Frye* rule. Close examination reveals that, in fact, virtually nothing that Huber says about *Frye* is true. From 1923 through the 1970s, *Frye* was never used to enforce scientific consensus on issues of scientific facts. *Frye* was never a tool for fighting junk science, especially in civil tort litigation. And as of 1991, when *Galileo's Revenge* was published, *Frye* was alive and well within its original limited

---

253. HUBER, GALILEO'S REVENGE, *supra* note 5, at 199. Huber continues:

> The expert whose testimony is not firmly anchored in some broader body of objective learning is just another lawyer, masquerading as a pundit.
>
> The challenge, then, is to determine when the anchor is secure. The only possible test is to confirm that other boats have favored similar moorings. The only way to tell that expertise is based on objective experience is to see whether others with similar experience favor similar methods, adopt similar procedures, embrace similar theories, and reach similar conclusions. That is pretty much the standard articulated decades ago by *Frye*.

Id. at 204.

254. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 199-200, 201 (referring to reality that judges choose pools of experts, such as physicians from Mayo Clinic, based on subjective standards, but that these standards are commonsense reflection of which scientists constitute consensus community and that stating applicable consensus for use in court is simple matter).

255. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 199, 201 (noting that *Frye* rule directed focus toward scientific consensus and that judges often apply *Frye* according to their own standards).

context; the "music" had not died at all.[256]

In reality, *Frye* was simply a federal criminal case in which the U.S. Court of Appeals for the D.C. Circuit, in the exercise of its specific common-law authority to prescribe rules of evidence for federal criminal trials "in the light of general authority and sound reason,"[257] addressed the admissibility of expert testimony setting forth the results of a "systolic blood pressure deception test," a rudimentary precursor to the modern polygraph.[258] The D.C. Circuit, in a remarkably casual analysis, announced a conservative approach to the evaluation of novel scientific techniques:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[259]

In the half-century that followed, many federal courts applied the common-law *Frye* rule in other criminal trials, not to throw out the particular factual conclusions of an expert as falling outside the consensus in his or her field, but to bar any expert from resorting to certain kinds of new scientific techniques, such as "voiceprints, neutron activation analysis, gunshot residue tests, bitemark comparisons, sodium pentothal, scanning electronic microscopic analysis, and numerous other forensic techniques," before they had gained general acceptance by the relevant scientific community.[260] During

---

256. *See infra* notes 265-67 and accompanying text (referring to courts' continued use of *Frye* rule).

257. *See* Rosen v. United States, 245 U.S. 467, 470-71 (1918) (following Benson v. United States, 146 U.S. 325, 334-35 (1892), which observed that sound reason, not common practice, should guide courts in determining reasons for allowing or denying expert testimony). The Supreme Court set forth the proposition that competency of witnesses in criminal trials is governed by common-law principles as interpreted and applied by the federal courts "in the light of reason and experience." Wolfle v. United States, 291 U.S. 7, 12 (1934). Congress confirmed this power by incorporating *Wolfle* into the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 26 advisory committee's note; *see also* Hawkins v. United States, 358 U.S. 74, 76-77 (1958) (recounting that Congress confirmed Supreme Court's authority to determine admissibility of evidence in rule 26).

Under rule 26, as it existed before the 1975 passage of the Federal Rules of Evidence, federal courts were free to fashion common-law evidence rules for criminal cases as long as they were consistent with the Federal Rules of Criminal Procedure. *See* Elkins v. United States, 364 U.S. 206, 216 (1960) (acknowledging that Court's supervisory power to devise evidentiary rules is governed by considerations of rule 26).

258. Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

259. *Id.* at 1014.

260. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half Century Later*, 80 COLUM. L. REV. 1197, 1205-06 (1980).

that same period, and well before the rise of the Calabresians in the 1970s, commentators rejected the *Frye* rule as overly vague and unduly restrictive in denying juries useful evidence.[261]

Consistent with its origins, *Frye* has served almost exclusively as a rule limited to the criminal law context. *Frye* has been predicated on a concern for the impact that novel forms of scientific investigation might have in criminal litigation, given the stakes involved in such cases.[262] Thus, sixty-four of the sixty-seven reported federal appellate decisions analyzing the admissibility of scientific evidence under

---

261. *See* PAUL C. GIANNELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE 13-14 (1986) (noting that "the [*Frye*] general acceptance test has been rejected by an increasing number of courts and attacked by commentators, who have labelled the test 'infamous,' 'a sport,' 'archaic,' and 'antiquated on the day of its pronouncement' "). Dean McCormick catalyzed the attack on the *Frye* rule in the first edition of his hornbook. *See* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 170, at 363 (1954) (" 'General scientific acceptance' is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence."). He further stated that "[a]ny relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." *Id.*

Other commentators have continued to attack the *Frye* rule. *See, e.g.*, Margaret A. Berger, United States v. Scop: *The Common-Law Approach to an Expert's Opinion About a Witness's Credibility Still Does Not Work*, 55 BROOK. L. REV. 559, 559 (1989) ("Wigmore, McCormick, and other eminent commentators . . . complained for decades about common-law restrictions on opinion evidence that deprived triers of fact of valuable information needed for sounder adjudications."); George C. Pratt, *A Judicial Perspective on Opinion Evidence Under the Federal Rules*, 39 WASH. & LEE L. REV. 313, 314 (1982) (stating that opinion rules reflect "enlightened, academic view of opinion testimony" that developed over 50-year period, but recognizing that there have been numerous objections to opinion testimony rules since their adoption); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 476-77 (1986) (stating that "as technology advanced and expert testimony became more important in the resolution of increasingly complex litigation, unnecessary impediments became unacceptable," and noting that "it became clear that the *Frye* rule might block the introduction of important and useful testimony").

262. *See* United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974) (urging that *Frye* standard has essential function of assuring that value of novel forensic techniques, such as voiceprints, can be intelligently contested by both sides in criminal trial). The court asserted that "the Frye test protects prosecution and defense alike by assuring that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case." *Id.* *Frye* also helps prevent possible unfairness to defendants by placing additional burdens on the prosecution when novel scientific evidence is offered. *See* United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977) (stating that *Frye* presents protection of defendant's interest in fair trial that is not protected when prosecution need not meet such high evidentiary standards). The Sixth Circuit went on to proclaim:

> A courtroom is not a research laboratory. The fate of a defendant in a criminal prosecution should not hang on his [or her] ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness,' although, in reality the witness is testifying on the basis of an unproved hypothesis in an isolated experiment which has yet to gain general acceptance in its field.

Id.; *see also* United States v. Fleishman, 684 F.2d 1329, 1336-37 (9th Cir.) (finding defendant's reliance on *Frye* rule as arising out of "concern[] with the possible prejudice to the defendant's right to a fair trial of admitting testimony of purported experts based upon insufficiently substantiated scientific theories, techniques or tests" inapposite to case at bar), *cert. denied*, 459 U.S. 1044 (1982); Giannelli, *supra* note 260, at 1244 ("The underlying problem is that the 'burden of rebuttal is generally borne in these criminal cases by defendants without the economic means to marshal scientific witnesses for a battle of the experts.' ") (quoting concurring opinion in State v. Williams, 388 A.2d 500, 506 (Me. 1978)).

Frye were criminal cases.[263] The theory that the *Frye* rule served for

263. The following federal appellate criminal cases cite *Frye* as a general test for the admissibility of scientific evidence: United States v. Todd, 964 F.2d 925, 930-31 (9th Cir. 1992); United States v. Jakobetz, 955 F.2d 786, 793-97 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992); United States v. Hadley, 918 F.2d 848, 853 (9th Cir. 1990), *cert. dismissed*, 113 S. Ct. 486 (1992); United States v. Two Bulls, 918 F.2d 56, 57-61 (8th Cir. 1990); United States v. Boise, 916 F.2d 497, 503-04 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991); United States v. Smith, 869 F.2d 348, 350-55 (7th Cir. 1989); United States v. Gillespie, 852 F.2d 475, 480-81 (9th Cir. 1988); Bundy v. Dugger, 850 F.2d 1402, 1421 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989); United States v. Christophe, 833 F.2d 1296, 1297-1300 (9th Cir. 1987); United States v. Kozminski, 821 F.2d 1186, 1194-95, 1198-1219 (6th Cir. 1987), *aff'd in part and remanded in part*, 487 U.S. 931 (1988); Little v. Armontrout, 819 F.2d 1425, 1427-32 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988); United States v. Shorter, 809 F.2d 54, 59-61 (D.C. Cir.), *cert. denied*, 484 U.S. 817 (1987); United States v. Kimberlin, 805 F.2d 210, 217 n.3 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); United States v. Gwaltney, 790 F.2d 1378, 1381-82 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987); United States v. McBride, 786 F.2d 45, 49 (2d Cir. 1986); United States v. Metzger, 778 F.2d 1195, 1203-04, 1205 (6th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986); United States v. Ferri, 778 F.2d 985, 988-90 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986); United States v. Smith, 776 F.2d 892, 898 (10th Cir. 1985); United States v. Davis, 772 F.2d 1339, 1345-47 (7th Cir.), *cert. denied*, 474 U.S. 1037 (1985); United States v. Solomon, 753 F.2d 1522, 1526 (9th Cir. 1985); United States v. Downing, 753 F.2d 1224, 1232-38 (3d Cir. 1985); United States v. Gould, 741 F.2d 45, 48, 49 n.2 (4th Cir. 1984); United States v. Torniero, 735 F.2d 725, 731 n.9 (2d Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985); United States v. Lewellyn, 723 F.2d 615, 619 (8th Cir. 1983); United States v. Valdez, 722 F.2d 1196, 1200-02 (5th Cir. 1984); United States v. Fleishman, 684 F.2d 1329, 1336-37 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982); United States *ex rel.* DiGiacomo v. Franzen, 680 F.2d 515, 517 n.2 (7th Cir. 1982); United States v. Tranowski, 659 F.2d 750, 755-57 (7th Cir. 1981); United States v. McFillin, 713 F.2d 57, 60-61 (4th Cir.), *cert. denied*, 454 U.S. 1056 (1981); McMorris v. Israel, 643 F.2d 458, 462 (7th Cir. 1981), *cert. denied*, 455 U.S. 967 (1982); United States v. Distler, 671 F.2d 954, 960-62 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979); United States v. Williams, 583 F.2d 1194, 1197-98 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979); Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.), *cert. dismissed sub nom.* Israel v. Hughes, 439 U.S. 801 (1978); United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978); United States v. McDaniel, 538 F.2d 408, 412-13 (D.C. Cir. 1976); United States v. Alexander, 526 F.2d 161, 163-64 (8th Cir. 1975); United States v. Carter, 522 F.2d 666, 685 n.67 (D.C. Cir. 1975); United States v. Franks, 511 F.2d 25, 33 n.12 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975); United States v. Addison, 498 F.2d 741, 743-45 (D.C. Cir. 1974); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973); United States v. Stifel, 433 F.2d 431, 436-41 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); Marks v. United States, 260 F.2d 377, 382 (10th Cir. 1958), *cert. denied*, 358 U.S. 929 (1959); Lindsey v. United States, 237 F.2d 893, 896 (9th Cir. 1956); Medley v. United States, 155 F.2d 857, 860 (D.C. Cir.), *cert. denied*, 328 U.S. 873 (1946).

The following federal appellate criminal cases cite *Frye* for its specific holding on the admissibility of polygraph tests: United States v. Piccinonna, 885 F.2d 1529, 1531-37 (11th Cir. 1989); Brown v. Darcy, 783 F.2d 1389, 1391, 1394-97 (9th Cir. 1986); United States v. Black, 684 F.2d 481, 483 (7th Cir.), *cert. denied*, 459 U.S. 1043 (1982); United States v. Clark, 622 F.2d 917, 917 (5th Cir. 1980), *cert. denied*, 449 U.S. 1128 (1981); United States v. Bad Cob, 560 F.2d 877, 882 n.10 (8th Cir. 1977); United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975), *cert. denied*, 424 U.S. 973 (1976); United States v. Baller, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); United States v. Cochran, 499 F.2d 380, 393 (5th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974); United States v. Frogge, 476 F.2d 969, 970 (5th Cir.), *cert. denied*, 414 U.S. 849 (1973); United States v. Alexander, 471 F.2d 923, 955 n.85 (D.C. Cir.), *cert. denied sub nom.* Murdock v. United States, 409 U.S. 1044 (1972); United States v. De Betham, 470 F.2d 1367, 1368 (9th Cir. 1972), *cert. denied*, 412 U.S. 907 (1973); United States v. Parman, 461 F.2d 1203, 1205 n.5 (D.C. Cir. 1971); United States v. Brown, 461 F.2d 134, 145 n.1 (D.C. Cir. 1971); United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965), *cert. denied*, 383 U.S. 944 (1966); McCroskey v. United States, 339 F.2d 895, 897 (8th Cir. 1965); United States v. McDevitt, 328

decades as a bulwark against junk science in a wide range of civil tort litigation simply holds no water. If that were true, for example, it would be difficult to understand how Huber's panorama of "cancer-by-pothole" cases, along with a number of other junk science cases ridiculed in *Galileo's Revenge* and decided in the heyday of *Frye* before the flowering of the "let-it-all-in" philosophy, could ever have emerged. In reality, despite Huber's credit of *Frye* as a tool against junk science and his claim that the Calabresians destroyed *Frye* as part of the 1975 Federal Rules of Evidence, there is not a single case decided by the federal appellate courts prior to 1975 that applied the *Frye* rule in a civil case of any kind. As of April 7, 1993, only three such decisions had been reported, two of which were decided in 1991.[264]

Moreover, there is nothing to Huber's claim that, as of the 1991 publication date of *Galileo's Revenge*, the *Frye* rule was dead. In fact, a total of nine circuits recognize *Frye* as a valid rule for excluding evidence, at least in criminal cases.[265] Only two circuits reject the use of the *Frye* rule.[266] Similarly, at the state level, at least twenty states

---

F.2d 282, 284 (6th Cir. 1964); Tyler v. United States, 193 F.2d 24, 31 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952).

This summary of the federal appellate history of the *Frye* rule was laid out in an amicus brief filed in the U.S. Supreme Court by several states in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* Brief of the State of Texas et al. as Amici Curiae at 2 n.1, Daubert v. Merrell Dow Pharmaceuticals, Inc. (U.S. Dec. 2, 1992) (No. 92-102). Neither party and none of the numerous amici in *Daubert* questioned the accuracy of the summary.

264. *See* Barrel of Fun, Inc. v. State Farm Fire & Casualty Co., 739 F.2d 1028, 1031 (5th Cir. 1984) (employing *Frye* to overturn district court's admission of type of "voice stress analysis" in civil diversity case involving insurance claim, but failing to consider propriety of imposing *Frye* in civil case); *see also* Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1115-16 (5th Cir.) (employing *Frye* to determine that district court was within its discretion to exclude medical expert's testimony in civil case where that testimony was not generally accepted within relevant scientific community), *cert. denied*, 112 S. Ct. 1280 (1991); Daubert v. Merrell Dow Pharmaceuticals, Inc., 951 F.2d 1128, 1129-30 (9th Cir. 1991) (using *Frye* to exclude epidemiological re-analysis studies in civil suit), *cert. granted*, 113 S. Ct. 320 (1992).

265. *See* United States v. Hudley, 918 F.2d 848, 853 (9th Cir. 1990) (stating that *Frye* test is appropriate test for determining admissibility of novel scientific technique), *cert. dismissed*, 113 S. Ct. 486 (1992); United States v. Two Bulls, 918 F.2d 56, 60 & n.7 (8th Cir. 1990) (applying both *Frye* test and rule 702 as compatible tests for admissibility of evidence); United States v. Smith, 869 F.2d 348, 351 (7th Cir. 1989) (stating that Seventh Circuit has continued to affirm and apply *Frye* standard); United States v. Shorter, 809 F.2d 54, 59-61 (D.C. Cir.) (stating that *Frye* test is standard for admissibility of new methods of scientific measurement), *cert. denied*, 484 U.S. 817 (1987); United States v. Metzger, 778 F.2d 1195, 1203 (6th Cir. 1985) (stating that Sixth Circuit predicates admission of scientific evidence upon application of *Frye* test), *cert. denied*, 477 U.S. 906 (1986); United States v. Smith, 776 F.2d 892, 898 (10th Cir. 1985) (applying *Frye* test); United States v. Gould, 741 F.2d 45, 49 (4th Cir. 1984) (adopting *Frye* test as proper standard for determining relevance of scientific testimony); Barrel of Fun, Inc. v. State Farm Fire & Casualty Co., 739 F.2d 1028, 1031 n.9 (5th Cir. 1985) (noting in civil case that Fifth Circuit has continued to apply *Frye* criteria as standard of admissibility); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979) (recognizing that *Frye* is valid test).

266. *See* United States v. Jakobetz, 955 F.2d 786, 794 (2d Cir.), *cert. denied*, 113 S. Ct. 104 (1992) (reaffirming rejection of *Frye* test); United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (rejecting *Frye* test as independent controlling standard of admissibility).

continue to embrace the *Frye* rule in the context of criminal litigation.[267]

B. The Ignorance of the Established Role of the Jury in Resolving Factual Issues

Huber's vocabulary in *Galileo's Revenge* is broad, yet almost nowhere to be found is what Huber apparently regards as "the 'J' Word"—jury. The concept of the jury, or of the Seventh Amendment right to civil jury trial, is listed nowhere in the thirteen-page index to *Galileo's Revenge*. Indeed, despite rather clear holdings by the Supreme Court that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,"[268] much of Huber's

---

267. ALABAMA: Adams v. State, 484 So. 2d 1160, 1162 (Ala. Crim. App. 1985); Prewitt v. State, 460 So. 2d 296, 301-04 (Ala. Crim. App. 1984).

ALASKA: Contreras v. State, 718 P.2d 129, 134-36 (Alaska 1986); Pulakis v. State, 476 P.2d 474, 478-79 (Alaska 1970).

CALIFORNIA: People v. McDonald, 690 P.2d 709, 724 (Cal. 1984); People v. Kelly, 549 P.2d 1240, 1244 (Cal. 1976).

CONNECTICUT: State v. Miller, 522 A.2d 249, 260 (Conn. 1987); State v. Atwood, 479 A.2d 258, 263-64 (Conn. Super. Ct. 1984).

DISTRICT OF COLUMBIA: Jones v. United States, 548 A.2d 35, 39 (D.C. 1988).

ILLINOIS: People v. Eyler, 549 N.E.2d 268, 285 (Ill. 1989), *cert. denied*, 111 S. Ct. 215 (1990); People v. Milone, 356 N.E.2d 1350, 1356-59 (Ill. App. Ct. 1976).

INDIANA: Hopkins v. State, 579 N.E.2d 1297, 1301-03 (Ind. 1991); Cornett v. State, 450 N.E.2d 498, 503 (Ind. 1983). *But cf.* Hopkins v. State, 579 N.E.2d 1297, 1305-06 (Ind. 1991) (concurring opinion) (suggesting that *Frye* has not been conclusively adopted in Indiana).

KANSAS: State v. Witte, 836 P.2d 1110, 1116 (Kan. 1992); Smith v. Deppish, 807 P.2d 144, 157-59 (Kan. 1991); State v. Washington, 622 P.2d 986, 991-92 (Kan. 1981).

KENTUCKY: Perry v. Commonwealth, 652 S.W.2d 655, 661 (Ky. 1983).

MARYLAND: Cobey v. State, 533 A.2d 944, 946 (Md. Ct. Spec. App. 1987), *cert. denied*, 538 A.2d 778 (1988); Reed v. State, 391 A.2d 364, 368-72 (Md. 1978).

MASSACHUSETTS: Commonwealth v. Curnin, 565 N.E.2d 440, 443 (Mass. 1991); Commonwealth v. Mendes, 547 N.E.2d 35, 37 (Mass. 1989).

MINNESOTA: State v. Fenney, 448 N.W.2d 54, 57 (Minn. 1989); State v. Mack, 292 N.W.2d 764, 767-68 (Minn. 1980).

MISSISSIPPI: Goodson v. State, 566 So. 2d 1142, 1146 (Miss. 1990) (applying general acceptance test, but not citing *Frye* by name).

NEBRASKA: State v. Reynolds, 457 N.W.2d 405, 417 (Neb. 1990).

NEW HAMPSHIRE: State v. Vandebogart, 616 A.2d 483, 488-91 (N.H. 1992); State v. Stewart, 364 A.2d 621, 623 (N.H. 1976); State v. Coolidge, 260 A.2d 547, 560-61 (N.H. 1969), *rev'd on other grounds*, 403 U.S. 443 (1970).

NEW MEXICO: State v. Blea, 681 P.2d 1100, 1103 (N.M. 1984).

OKLAHOMA: Rawlings v. State, 740 P.2d 153, 161 (Okla. Crim. App. 1987) (adopting general acceptance standard but not citing *Frye* explicitly); Driskell v. State, 659 P.2d 343, 356 (Okla. Crim. App. 1983); Smith v. State, 656 P.2d 277, 281 (Okla. Crim. App. 1982).

PENNSYLVANIA: Commonwealth v. Rodgers, 605 A.2d 1228, 1234-35 (Pa. Super. Ct. 1992); Commonwealth v. Nazarovitch, 436 A.2d 170, 172 (Pa. 1981); Commonwealth v. Topa, 369 A.2d 1277, 1281 (Pa. 1977).

SOUTH DAKOTA: State v. Adams, 418 N.W.2d 618, 620 (S.D. 1988); State v. Helmer, 278 N.W.2d 808, 812 (S.D. 1979).

WASHINGTON: State v. Ortiz, 831 P.2d 1060, 1069 (Wash. 1992) (en banc); State v. Martin, 684 P.2d 651, 654 (Wash. 1984).

268. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

book proceeds as if the jury did not exist, and as if only judges are entrusted with the task of deciding the facts of a case. For example, Huber lauds the "wise judges" who "affirm[] the solid science and reject[] the paranoid speculation."[269]

In applying the reinvigorated *Frye* rule, Huber explains that the wise judge should decide which community of scientists to consult.[270] He or she should then "determin[e] just where the mainstream scientific consensus lies," based on "[c]areful reviews of current learning . . . published in top-notch scientific journals."[271] These journals "have long track records of accuracy and insight," and what the wise judge "trusts is the institution, the process, the collegiality, the experience, and the track record."[272] Huber writes that "[t]he consensus scientific community supplies stopping points in abundance," such as the FDA's opinion of the safety of Bendectin, the National Institute of Health's opinion on the value of electronic fetal monitors, or the Centers for Disease Control's opinion on the causes of pelvic infection.[273] Although such authoritative opinions are not infallible, Huber finds that they are "less fallible—*much* less fallible—than a thousand juries scattered across the country grappling with the complexities of immune system impairment after being educated by the likes of Bertram Carnow or Arthur Zahalsky,"[274] whom Huber regards as high priests of the junk science movement.

In short, Huber objects to any legal system that, in the face of a "definitive pronouncement[]" from an authoritative scientific organization, would dare ask a jury its view of a factual issue.[275] Reliance on juries leads to "despotism sold by the drink," at the hands of "activist legal bartenders."[276] Huber believes that inviting random panels of jurors to decide scientific truth by majority vote repudiates the existence of objective fact. "The 'rule of law' is a completely empty promise if key facts are infinitely plastic, if there is no external and no immutable reality."[277] "It is simply unacceptable for any judge to insist that there is no such thing. With or without the modern philosopher's blessing, . . . lines can and must be drawn" be-

269. HUBER, GALILEO'S REVENGE, *supra* note 5, at 193.
270. HUBER, GALILEO'S REVENGE, *supra* note 5, at 199.
271. HUBER, GALILEO'S REVENGE, *supra* note 5, at 200.
272. HUBER, GALILEO'S REVENGE, *supra* note 5, at 200-01.
273. HUBER, GALILEO'S REVENGE, *supra* note 5, at 201.
274. HUBER, GALILEO'S REVENGE, *supra* note 5, at 201.
275. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 202 (criticizing fact that judicial system permits juries, rather than FDA, CDC, or other well-respected sources of scientific literature, to decide if drug is carcinogenic).
276. HUBER, GALILEO'S REVENGE, *supra* note 5, at 218.
277. HUBER, GALILEO'S REVENGE, *supra* note 5, at 219.

tween science and pseudoscience, between "fact and fantasy."[278] In Huber's legal universe, the judge commands factfinding and is to direct factual resolutions toward the mainstream consensus.[279]

> The judge who meticulously steers the search for the most authoritative, reliable assessment of Bendectin, or the origins of cerebral palsy, or the causes of sudden acceleration, is not surrendering her independence, she is vindicating it. In other circles, countless extraneous considerations might corrupt the inquiry into the facts. The judge's unique privilege and responsibility is to do her utmost to get the facts right.
>
> In the long run, a judge's independence is increased, not reduced, by careful respect for external law, whether written by other judges, legislators, constitutional framers, or the still higher authority, beyond any appeal, that enacted the laws of nature.[280]

If the remainder of the book left any doubt, this passage from *Galileo's Revenge*, coming five pages from the close, makes clear that Huber is a legal theorist operating on the radical fringe whose prescriptions cannot be taken seriously in our contemporary constitutional order, at least in the federal court system.[281] As the U.S. Supreme Court has often remarked, "[t]he right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence,' "[282] and that right is also protected in all states and in the

---

278. HUBER, GALILEO'S REVENGE, *supra* note 5, at 223.

279. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 224 (asserting that "judge's unique privilege and responsibility is to do her utmost to get the facts right" and that to do this judge must make disciplined pursuit of true science, commonly reflected as scientific consensus).

280. HUBER, GALILEO'S REVENGE, *supra* note 5, at 224.

281. Apart from the radical legal nature of Huber's theory that complex issues of scientific fact should be entrusted to "wise judges" rather than juries, the course on which he would have these judges embark has little support in scientific reality. It is well beyond the scope of this Article to respond to Huber's undocumented lay opinion that as to each factual issue an authoritative "scientific consensus" can be found, and that select scientific journals serve as the repository of this consensus. The interested reader, however, will find ample rebuttal of Huber's views in various briefs filed in the *Daubert* case recently considered by the U.S. Supreme Court. *See, e.g.*, Brief of Physicians, Scientists, and Historians of Science as Amici Curiae in Support of Petitioners, Daubert v. Merrell Dow Pharmaceuticals, Inc. (U.S. Dec. 2, 1992) (No. 92-102) (containing extensive rebuttal of many of Huber's views of science; authors include scientists and historians of science Stephen Jay Gould, Gerald Holton, Everett Mendelsohn, and Dorothy Nelkin); Brief for Petitioners at 47-49, *Daubert* (No. 92-102) (rejecting view that prior publication in peer review journal can be predicate for admissibility of expert testimony); Brief of American Society of Law, Medicine, and Ethics et al. as Amici Curiae, *Daubert* (No. 92-102) (documenting frequent use by scientists and government regulators of nonpeer-reviewed scientific analysis); Brief of Daryl E. Chubin et al. as Amici Curiae, *Daubert* (No. 92-102) (rebutting many of Huber's conceptions about supposed value of institution of peer review for promoting scientific "truth").

282. Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943) (quoting Jacob v. New York City, 315 U.S. 752, 752 (1942)); *see also* Lyon v. Mutual Benefit Health & Accident Assoc., 305 U.S. 484, 492 (1939) ("It is essential that the right to trial by jury be scrupulously safeguarded."); Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (stating that "any seeming curtailment of the right to a jury trail should be scrutinized with the utmost care"); Grand Chute v. Winegar, 82

District of Columbia in criminal trials by the Sixth Amendment[283] and in civil cases by state constitution or statute.[284]

Despite the "careful respect for . . . constitutional framers" that Huber suggests judges should hold, he ignores the fact that the Constitution commands judges to defer to juries in resolving matters of credibility and factfinding. Such a command may not be modified ad hoc in the pursuit of fealty to scientific consensus or consistency and efficiency in adjudication.[285] As Chief Justice Rehnquist stated some time ago, such policy goals "cannot obscure or dilute [the] obligation to enforce the Seventh Amendment," for the founders of our nation considered the civil jury trial "an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or, it might be added, to that of the judiciary."[286] As has been thoroughly recounted by Chief Justice Rehnquist and numerous scholars, the Seventh Amendment was the product of the colonials' perception of repression at the hands of biased judges appointed by the Crown; whether or not that concern was well-founded, the Federalists' guarantee that a civil jury trial would be included in the Bill of Rights was essential to the passage of the Constitution itself.[287] Both in its pedigree and in its

---

U.S. (15 Wall.) 373, 375 (1872) (stating that right to trial by jury is "great constitutional right").

283. *See* Duncan v. Louisiana, 391 U.S. 145, 147-58 (1968) (incorporating Sixth Amendment right to jury trial in criminal cases through Fourteenth Amendment to apply to states).

284. All 50 states and the District of Columbia preserve or provide a constitutional, statutory, or case law right to a jury trial in civil cases, subject in some instances to a subject matter or an amount in controversy requirement. *See* ALA. CONST. art. I, § 11; ALASKA CONST. art. I, § 16; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, § 7; CAL. CONST. art. I, § 16; COLO. R. CIV. P. 38; CONN. CONST. art. I, § 19; DEL. CONST. art. I, § 4; D.C. CODE ANN. § 11-715 (1961), Paton v. Rose, 191 A.2d 455, 456 (D.C. 1963) (explicating D.C. jury guarantee); FLA. CONST. art. I, § 22; GA. CONST. art. I, § 1, ¶ XI; HAW. CONST. art. I, § 13; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, § 20; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 5; KY. CONST. § 7; LA. CODE CIV. PROC. art. 1731 (West 1987); LA. CODE CIV. PROC. art. 1732(1) (West 1987); ME. CONST. art. I, § 20; MD. CONST. Dec. of Rights art. 23; MASS. CONST. ANN. pt. 1, art. 15; MICH. CONST. art. IV, § 44, MICH. COMP. LAWS § 600.1352 (1991); MINN. CONST. art. 1, § 4; MISS. CONST. art. VI, § 147; MO. CONST. art. I, § 22(a); MONT. CONST. art. III, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. pt. I, art. 15, § 20; N.J. CONST. art. I, ¶ 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 25; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6; R.I. CONST. art. I, § 15; S.C. CODE ANN. § 27-37-60 (Law. Co-op. 1991); S.D. CONST. art. VI, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. V, § 10; UTAH CONST. art. I, § 10; VT. CONST. art. XII; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 21; W.V. CONST. art. III, § 13; WIS. CONST. art. I, § 5; WYO. CONST. art. I, § 9, WYO. R. CIV. P. 38.

285. *See* Codispoti v. Pennsylvania, 418 U.S. 506, 536 (1974) (noting that where constitutional right to jury trial applies, fact-finding must be carried out by jury, not judge).

286. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting).

287. *See id.* at 340-44 (recounting history of Seventh Amendment and popular call for civil jury trials in Constitution ratification debates); *see also* Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-35 (1980) (recognizing high regard for jury trial among American colonists in context of colonial debates over jury trials for equity cases); Charles W. Wolfram, *The Constitutional History of the Seventh Amend-*

functioning, the Seventh Amendment is thus a vital check on the autocratic tendencies that might, absent the jury trial guarantee, develop within the life-tenured federal judiciary.[288]

Apart from the constitutional absurdity of Huber's position, there is little empirical support for the view that a jury is less able to resolve scientific issues involving expert testimony than is a single, nonexpert judge. Thus, there is no ground for Huber's view that it is somehow desirable for judges to muscle juries out of the way in the fight against junk science. To the contrary, as has been noted in an essay by Judge Patrick Higginbotham, a judge Huber depicts as one of the fiercest critics of junk science,[289] the use of a jury to resolve difficult scientific questions confers significant benefits to the civil justice system.[290] The presence of a jury makes "an enormously valuable contribution" to the clarity of argumentation by "forcing counsel to organize a complex mass of information into a form understandable by the uninitiated."[291] "Apart from the occasional situation in which a judge possesses unique training, . . . the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion."[292]

A lively debate raged in both the lower federal courts and the academic community a decade ago over the question of whether some cases are simply too complex for a lay jury to resolve.[293] The con-

---

ment, 57 MINN. L. REV. 639, 653-730 (1974) (discussing debate between Federalists and Anti-federalists over adoption of Seventh Amendment).

288. *See* Granfinanceria, S.A. v. Nordberg, 492 U.S. 33, 83 (1989) (White, J., dissenting) ("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge."); *Parklane*, 439 U.S. at 344-50 (Rehnquist, J., dissenting) (arguing that right to jury trial protects against incursions by government or judiciary); *see also* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 580 (1990) (Brennan, J., concurring in part and concurring in judgment) (recounting that Seventh Amendment originated from "encroachment on civil jury trial by colonial administrators"). As Judge Patrick Higginbotham has explained, the Seventh Amendment flowed largely from the need for a check on the otherwise unaccountable power of appellate courts. *See* Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 48-50 (1977) (equating debate over jury trials as debate over who will be trier of fact). American courts have a "peculiar need for the democratizing influence of the jury" because an independent judiciary carries with it an "attendant risk of autocratic behavior." *Id.* at 52.

289. *See* HUBER, GALILEO'S REVENGE, *supra* note 5, at 205 (stating that Judge Higginbotham has urged judiciary to "take hold of expert testimony in federal trials").

290. *See* Higginbotham, *supra* note 288, at 52 (asserting that use of jury in civil trials protects against risk of autocratic, independent judiciary).

291. Higginbotham, *supra* note 288, at 54.

292. Higginbotham, *supra* note 288, at 53.

293. *See, e.g.*, Arnold, *supra* note 287, at 848 (concluding that there is no precedent for denial of plaintiff's right to jury trial on account of complexity of litigation); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 106-07 (1980) (concluding that English history favors courts' denial of jury trial when practical abilities of jury to find fact is impaired); Constance S. Huttner, Note, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L.

troversy's fire was stoked by a Third Circuit holding that, in light of due process concerns, the Seventh Amendment does not necessarily mandate a jury trial in complex cases,[294] and a Ninth Circuit holding that there is no "complexity exception" to the Seventh Amendment.[295] The consensus today is that juries are fully able to resolve complex issues, including the conflicting assertions contained in complex expert testimony. A special symposium on the civil jury system organized by the Brookings Institution and the American Bar Association in 1992 and composed of judges, academics, and plaintiff- and defense-side lawyers reaffirmed "a strong commitment to a civil jury of lay persons," which is "a valuable process for decisionmaking and an effective means for arriving at a fair resolution of disputed facts."[296] The symposium also concluded that "the jury provides important protections against the abuse of power by legislatures, judges, the government, business, or other powerful entities."[297] Rejecting efforts to supplant lay juries with more "expert" tribunals,[298] the symposium exhibited a "strong sentiment" to "resist efforts to reduce the jury's role" and "strongly rejected proposals for blue ribbon or expert juries for resolving complex cases."[299]

REV. 511, 533-38 (1979) (suggesting that improved judicial management of complex litigation is preferable to curtailment of right to jury trial); Montgomery Kersten, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99, 115 (1979) (arguing that courts' restriction of right to trial by jury is unnecessary).

294. *See In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (3d Cir. 1980) (observing that complexity of case may exceed jury's ability to decide rationally and that denial of jury trial in these cases does not abrogate due process).

295. *See In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) (refusing to read complexity exception into Seventh Amendment), *cert. denied*, 446 U.S. 929 (1980).

296. BROOKINGS INST., CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 8 (1992) [HEREINAFTER CHARTING A FUTURE].

297. *Id.* at 9 (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339-40 (1979) (Rehnquist, J., dissenting)).

298. *See* William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 942-50, 995-1004 (1981) (recommending use of carefully selected "special juries" or expert nonjury tribunals for complex litigation).

299. CHARTING A FUTURE, *supra* note 296, at 2-4. This approach was rejected, among other reasons, on the view that "the jury provides an important check on the bureaucratization and professionalization of the legal system," preventing

> adjudication from becoming technical and routinized, perhaps even distant and insensitive, as cases with similar fact patterns recur over and over before the same decisionmaker (the judge). The jury brings common sense and fairness to its decisions, cutting through the arcane and often overly detailed presentations of information by lawyers and judges. Lawyers can over-try cases, jury instructions can obfuscate basic legal principles, and judges can be mysterious and distant participants in the process.

Id. at 10. The report concluded:

> It is our collective experience, supported by the available evidence, that no case is inherently too complex for juries to decide. In our view, if juries find issues and facts too complex, it is because the *lawyers* have failed to present their cases clearly or

Instead of circumscribing the jury's role, the symposium endorsed a wide range of proposals to further improve the capacities of the civil jury, to "move the jury from being a 'passive' fact-finder to taking a more 'active' part in the trial process," through the use of such devices as pretrial instructions, notetaking, exhibit notebooks, online access to transcripts of testimony, minisummary statements during trial, increased use of visual exhibits during trial, "plain language" instructions, larger juries to enhance consistency of outcomes, and enhanced training of both lawyers and judges in the ability to run effective trials.[300]

The U.S. Supreme Court has also exhibited considerable confidence in our basic system of jury justice. As the Court noted in *Barefoot v. Estelle*:[301] "[T]he rules of evidence generally extant at the federal . . . level[] anticipate that relevant, unprivileged evidence should be admitted and its weight left to the fact finder, who would have the benefit of cross examination and contrary evidence by the opposing party."[302]

In *Barefoot*, the Court stressed that "the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal."[303] Although Huber enjoys depicting those who disagree with his junk science concerns as "far-siders straight out of a Gary Larson cartoon,"[304] the extreme, almost caricatured views of

---

judges have failed to structure the proceedings in a way that would simplify matters for the jury to understand them.

Id. at 18 (emphasis added).

300. *Id.* at 16-27. A substantial body of commentary has developed along these lines. *See, e.g.*, Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 764-74 (1991) (advocating continued and increased participation of juries in adjudication and suggesting improvements to increase jury comprehension of issues and facts); Committee on Fed. Courts of the New York State Bar Assoc., *Improving Jury Comprehension in Complex Civil Litigation*, 62 ST. JOHN'S L. REV. 549, 570 (1988) (reviewing potential improvements in jury comprehension of issues and facts in civil litigation); Judyth W. Pendell, *Enhancing Juror Effectiveness: An Insurer's Perspective*, 52 LAW & CONTEMP. PROBS., Autumn 1989, at 311, 321 (pointing out that increased predictability of trial outcomes is helpful to insurers and recommending measures to improve jury efficiency); Carrie P. Withey, *Court-Sanctioned Means of Improving Jury Competence in Complex Civil Litigation*, 24 ARIZ. L. REV. 715 (1982) (suggesting that already existing court-sanctioned procedures for sorting out difficulties in complex litigation is preferable to use of special juries or administrative tribunals).

301. 463 U.S. 880 (1983).

302. Barefoot v. Estelle, 463 U.S. 880, 898 (1983).

303. *Id.* at 902 (citation omitted). The Court repeated that emphasis in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), noting with regard to opinion testimony that "the ultimate safeguard" in the Federal Rules is "the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." *Id.* at 168.

304. HUBER, GALILEO'S REVENGE, *supra* note 5, at 17.

the American legal system on which Huber depends are amply revealed by his discussion of *Barefoot*.

Barefoot considered a constitutional challenge to the receipt of psychiatric testimony on future dangerousness in a state criminal proceeding.[305] The mainstream of the psychiatric profession believed that psychiatrists' efforts to make such predictions were utterly unreliable, a point brought to the Court's attention in an amicus curiae brief of the American Psychiatric Association (APA).[306] Without challenging the accuracy of the APA's headcount, the Court responded:

> If [the four psychiatrists whose testimony was at issue] are so obviously wrong and should be discredited, there should be no insuperable problem in doing so by calling members of the Association [to testify against them]. . . . We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence . . . .
>
> All of these doubts about the usefulness of psychiatric predictions can be called to the attention of the jury . . . . Petitioner's . . . argument . . . is founded on the premise that the jury will not be able to separate the wheat from the chaff. We do not share in this low evaluation of the adversary process.[307]

Huber writes contemptuously of the Court's vigorous defense of the capabilities of the lay jury:

> [T]he question before the High Court was whether a certain brand of psychiatric soothsaying ranks as real science. The American Psychiatric Association declared that it doesn't, and all the Justices conceded that two-thirds of the predictions made by certain psychiatric prophets are wrong. No matter, a majority concluded in a dismal display of let-it-all-in reasoning: a jury can always be trusted "to separate the wheat from the chaff." The chaff in this case was represented by a psychiatrist nicknamed "Dr. Death," a man who testifies frequently on the "future dangerousness" of capital defendants. The upshot was that Thomas Barefoot, his future dangerousness suitably certified by a credentialed expert, was executed by lethal injection in Huntsville, Texas, just after midnight on Tuesday, October 24, 1984.[308]

Apart from revealing Huber's dependence on a wholesale rejection of mainstream thinking about law, this passage of his book fails to come to grips with the implications of the Supreme Court's disa-

---

305. *Barefoot*, 463 U.S. at 896.

306. Brief for the American Psychiatric Association as Amicus Curiae, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080), *available in* LEXIS, Genfed Library, Briefs File.

307. *Barefoot*, 463 U.S. at 900-01 & n.7.

308. HUBER, GALILEO'S REVENGE, *supra* note 5, at 219-20.

greement with his view of *Barefoot*. If the Supreme Court is willing to permit a human being to be put to death on the basis of what, under Huber's calculus, is clearly junk science, it is difficult to see why the Court, or other judges, should put much stock in Huber's plea that the danger of erroneous jury verdicts in civil tort litigation justifies a wholesale revision of our legal system, and especially of the role of the jury.[309]

At the least Huber is candid about his agenda, and the radical nature of his position. He succinctly states near the close of *Galileo's*

---

309. In particular, it is hard to put any stock in Huber's complaint that the present system invites "random panels of jurors . . . to decide scientific truth by majority vote" repudiates "the existence of objective fact," and that "[i]t is not especially scientific to . . . sit back, let everything in, and invite random groups of twelve stout citizens to vote as they please." HUBER, GALILEO'S REVENGE, *supra* note 5, at 218, 228. Huber harps on the fallibility of "a thousand juries scattered across the country grappling with the complexities of immune system impairment" or other health harms. *Id.* at 201. In fact, Huber's worries about the "inconsistency" in results of individually empaneled juries simply reflect an endemic feature of a case-by-case system of adjudication coupled with the use of a lay jury as a means of providing a needed check on the power of the life-tenured judiciary.

As Justice Kennedy observed in the far more visible and troublesome area of inconsistent punitive damages awards, the evolution of the jury system over the centuries in general demonstrates that "[o]ur legal tradition is one of progress from fiat to rationality," and "[e]lements of whim and caprice do not predominate" in a properly functioning jury system. Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032, 1055 (1991) (Kennedy, J., concurring). "Some inconsistency of jury results can be expected," of course, partly because "the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions." *Id.* Indeed, in the area of criminal law "[i]t has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required." Hamling v. United States, 418 U.S. 87, 101 (1974). In fact, " 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.' " *Id.* at 101 (quoting Roth v. United States, 354 U.S. 476, 492 n.30 (1957)).

The preeminent role our civil justice system gives the jury reveals the fundamental consistency underlying what on the surface might appear to be a pattern of inconsistent verdicts in cases involving different plaintiffs but similar scientific evidence. "[T]he many ways in which lawyers are accustomed to talking about 'inconsistency' in the law do not really conflict with the widespread assumption that legal systems are consistent." *See* John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1000 (1992) (applying mathematical analysis of number theory systems to legal system and concluding that it is impossible to derive consistent rule for every fact pattern). One can conclude that these "different results are but consistent applications of the higher rule (metarule)" that operates here. *Id.* at 1001.

The core function of the jury is to check the discretion of Article III judges by evaluating the weight of evidence and the credibility of witnesses. *See supra* notes 285-88 and accompanying text (discussing function of jury). Obviously, in every case in which the jury is permitted to do its job, regardless of whether the outcomes in any range of cases are the same, this core function is consistently carried out. "[A]t times the law may not require one action or decision only, but instead permits a particular range of choices"; even where "discretion is exercised in different ways on identical facts . . . there is still legal consistency . . . [that] results from the very fact that the law permits a range of choices." *Id.* at 1001-02. As Justice Kennedy emphasized in *Haslip*, the institution of jury trial naturally assumes and respects the discretion of juries to reach inconsistent outcomes in separate cases as the price of ensuring a consistent adjudicative process. *See Haslip*, 111 S. Ct. at 1054 (Kennedy, J., concurring) (asserting that mark of sound legal system is that its procedures and not necessarily its decisions have stood test of time).

Revenge: "The rule of law is indeed a grand thing, but not half so grand as the rule of fact."[310] Of course, as Chief Justice Rehnquist noted, because of the centuries-old constitutional pact leading to the Seventh Amendment, "no amount of argument that [a new procedural] device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791."[311] Huber's "rule of fact," presumably administered by autocratic "social controllers" in the line of the "grand Inquisitors, the Hitlers, and Stalins"[312] rather than by jurors, may be an option in other countries, but not in ours.

IV. THE SELLING OF PETER HUBER: THE NEW "MANHATTAN PROJECT"

The flagrant shortcomings of Huber's first tort-reform book, *Liability: The Legal Revolution and Its Consequences*, have been on record for years now.[313] Many of the same errors that infected that book, such as bias, distortion of fact, and tendentious renderings of judicial opinions and legal treatises, also plague *Galileo's Revenge*. In both cases, these flaws, which render the books little more than quasihistorical, quasihysterical accounts of recent developments in the law, are either manifest or readily discovered.

To be sure, Peter Huber's style of writing is breezy and interesting. But Huber's marriage of his carefree style of writing to a careless style of research and analysis render his two major works on tort liability of little value for the reader. Despite this, as documented in Part I of this Article, Huber has long been regarded as the intellectual guiding light of the tort-reform movement, not only in the departed Bush-Quayle administration, but on Capitol Hill and in academia as well.[314] The mystery remains: Given the slipshod quality of Huber's writings, why is he so influential? The answer appears to be money and organization. The money is provided by insurance companies and other corporations, acting individually and also through corporate foundations and conservative think tanks, whose interests are endangered by lawsuits and who are thus willing to invest money today in the hope of reducing their exposure to liability tomorrow. The organization is provided by individuals and tort re-

---

310. HUBER, GALILEO'S REVENGE, *supra* note 5, at 225.
311. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1979) (Rehnquist, J., dissenting).
312. HUBER, GALILEO'S REVENGE, *supra* note 5, at 217.
313. *See supra* notes 86-102 and accompanying text (discussing criticisms of various flaws in *Liability*).
314. *See supra* 37-42 and accompanying text (detailing Huber's influence and highlighting his popularity with Bush administration).

form groups who lead the charge on behalf of these entities. An examination of the influence this assistance has garnered Huber in the tort arena provides a fascinating case study of the role of public relations in the ongoing policy debate over reform of the American legal system.

A. The Discovery of Peter Huber

In 1986, investment in Peter Huber appeared to be a prudent choice. Just one year earlier, Huber had published a law review article asserting that society in general and courts in particular are overly, almost obsessively preoccupied with "public risks," i.e., those "threats to human health or safety that are centrally or mass-produced, broadly distributed, and largely outside the individual risk bearer's direct understanding and control."[315] Huber suggested that citizens and governments, not to mention corporations, would be better off if individuals stopped worrying about the lack of air bags in cars and just started driving more safely; if they stopped obsessing about polluted air, contaminated water, and environmental toxins, and focused instead on examples of their own heedless behavior, such as smoking, drinking, or overeating.[316] Huber's article attracted the attention of Reagan administration ideologues and their colleagues in Congress, where debate was picking up steam over tort reform and the alleged insurance crisis.[317]

Huber's article proved to be an intellectual godsend to a movement that was long on lobbyists and cash but short on ideas. Just one year after its publication, Victor E. Schwartz, general counsel of the Products Liability Alliance and long regarded as the tort reform movement's chief lobbyist and spokesperson on Capitol Hill,[318] was asked what he thought of Huber's article and what made Huber so helpful to corporate America's campaign to undo a quarter century of progress in the law of torts. Schwartz replied that Huber's essay did nothing less than provide " 'the intellectual underpinning' of the tort reform effort."[319] A reason for its importance, added Schwartz, was that Huber "was *untainted* by any relationship with the

---

315. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 277 (1985).

316. *Id.* at 277-79.

317. Sheila Kaplan, *These Perennials Are Lobbyists' Cash Cows*, LEGAL TIMES, Feb. 5, 1990, at S3.

318. *See supra* note 51 and accompanying text (describing role of Victor Schwartz in tort reform movement).

319. W. John Moore, *Peter Huber; Free-Lance Critic Hits Shackles of Regulation*, NAT'L J., Nov. 15, 1986, at 2797, 2797 (quoting Victor E. Schwartz).

manufacturers who are leading the fight for tort reform."[320]

B. The Manhattan Institute's Packaging of Peter Huber

Having discovered this pure, unadulterated tonic, corporate America proceeded to do with Huber what it usually does with such treasures: it commenced to bottle and market him, albeit with the hope of making it appear that he remain "untainted." Thus, in March 1986, the Manhattan Institute for Policy Research, a conservative "think tank,"[321] asked Huber to join Richard Epstein, professor of law at the University of Chicago, and Richard Willard, head of the Justice Department's Civil Division and Chief of the Reagan administration's Tort Policy Working Group, in a public forum on "The Liability Crisis: Who's to Blame?"[322] The program was scheduled to inaugurate the Manhattan Institute's "Project on Civil Justice Reform."[323]

Of course, the idea of using a forum to focus attention on the sponsor's view of an issue is not unusual; such forums, combined with position papers, are the *raison d'etre* of Washington think tanks. What made the Project on Civil Justice Reform forum somewhat unique, and what has made the Manhattan Institute especially influential over the years are, first, how effectively the Manhattan Institute publicized the forum and, second, how it carefully capitalized on the forum in its aftermath.[324] In an internal report, the Manhattan Institute president, William M.H. Hammett, explained:

> Follow-up [of the forum] was [deemed] essential and this is what we did during the rest of 1986:

---

320. *Id.* (emphasis added).

321. *See generally* MANHATTAN INST. FOR POLICY RESEARCH, HISTORY AND BACKGROUND 1 (1990) [hereinafter HISTORY AND BACKGROUND] (on file with *The American University Law Review*) (describing development of Manhattan Institute).

> Formed originally [in 1978] as the [non-profit] International Center for Economic Policy Studies, the Institute was renamed in 1981 to reflect an expanded policy agenda. The Manhattan Institute was a moving force behind the book, *Wealth and Poverty*, by George Gilder, its then program director, which was widely credited with laying the basis for what has since become known as supply-side economics. Later, the Institute provided a catalyst for Thomas Sowell's work on ethnicity (*Markets and Minorities*, 1981) and Charles Murray's penetrating critique of contemporary welfare policy (*Losing Ground: American Social Policy 1950 - 1980*, 1984).

Id.

322. *See* MANHATTAN INST. FOR POLICY RESEARCH, THE LIABILITY CRISIS: WHO'S TO BLAME? 2 (1986) [hereinafter LIABILITY CRISIS] (detailing comments of speakers and questions of attendees at Manhattan forum discussing increased amount of tort litigation in United States).

323. *Id.*

324. *Cf.* Memorandum from William M.H. Hammett, President, Manhattan Institute for Policy Research, to All Civil Justice Contacts 1 (Jan. 7, 1987) [hereinafter Hammett Memorandum] (on file with *The American University Law Review*) (observing that "[r]eporters from all the national papers and magazines were there and the event generated numerous news articles").

1) Published a 24-page *Manhattan Report* with the proceedings of the seminar along with additional analysis of the breakdown of civil law. This report was mailed to 25,000 carefully selected people in government, academia, business, media and the law. It was reprinted in the *Empire State Report* and in CNA's newsletter and extracted in the *Wall Street Journal* and several other papers.

2) We held two workshops, one in Washington, DC in June and one in New York in August. The first included thirty corporate government affairs officers while the second, a full-day seminar, brought together fifteen academic scholars from across the country.

3) With assistance from a number of our friends, we compiled a mailing list of over 400 journalists who have written about the liability crisis.

4) Our project director, Walter Olson, published numerous "op-eds" on the subject, including a major piece in the *Wall Street Journal*. An article by him on directors' and officers' liability, which was published in the July issue of *Across the Board*, was mailed by us to over one thousand CEOs as well as to our media list.[325]

---

325. Hammett Memorandum, *supra* note 324, at 1. These mailings to "over one thousand [corporate] CEOs" were not just for informational purposes. According to Hammett,

> Since May, Walter Olson and I have met with over a hundred corporate counsels and CEOs . . . in an effort to get our project funded. In that time, we've learned much about the legal problems facing corporate America and have compiled the following list of blue-chip supporters (amounts of 1986 support in parentheses): AETNA ($10,000); Alexander & Alexander ($1,500); American Home Products ($5,000); American International Group ($5,000); Blue Bird Body ($1,000); Burlington Northern ($1,000); Chubb ($8,000); CIGNA ($5,000); Combined International ($5,000); Cooper Industries ($1,000); Crum and Forster ($2,500); General Electric ($10,000); General Mills ($1,000); Foxboro ($1,000); Hartford Insurance ($500); Illinois Tool Works ($750); Jervis B. Webb Company ($500); Kaman ($500); Ko-Rec-Type ($2,000); Merrill Lynch ($5,000); Metropolitan Life ($2,000); Milliken ($5,000); Prudential ($7,500); Reliance Holdings ($5,000); RJR Nabisco ($20,000); SAFECO ($1,000); Santa Fe Southern Pacific ($5,000); Sears, Roebuck ($7,500); SmithKline Beckman ($5,000); Squibb ($1,000); State Farm ($5,000); Texaco ($5,000); Travelers ($3,000).

Id. All told, these contributions totaled $114,500—nearly half of which, $52,500, was supplied by insurance companies. *Id.* at 2.

Six years later, the projected budget for the Judicial Studies Program had swollen nearly nine-fold to $955,000. MISSION STATEMENT, *supra* note 38, at 8. Of this amount, $500,000 was earmarked for the salaries and benefits of Huber, Walter Olson, and Michael Horowitz, the newly designated acting director of the program who served as former general counsel of the Office of Management and Budget under Reagan and was a former member of the Reagan Justice Department's Tort Policy Working Group. *Id.* Another $180,000 was allocated for "Outreach (Conferences, travel, printing, etc.)." *Id.*

Where this funding comes from is as interesting as where it is allocated, for it is often the piper who calls the tune. Notwithstanding the Manhattan Institute's stated ambition to voice populist themes and its expressed desire to represent not just the "financial community" but "civil libertarians" and "consumer groups" as well, *id.* at 3, it appears that corporate America has the biggest financial stake in the Judicial Studies Program's "Mission." Major contributors include: 14 of the nation's largest insurance companies (Aetna, Alexander & Alexander, CIGNA, CNA, Crum & Forster, Employers Mutual Casualty, GEICO, Alexander Hamilton

In hindsight, it appears that the most important development in the Manhattan Institute's initial focus on tort liability issues was yet to come. In November 1986, Hammett writes, Huber

> became [the Manhattan Institute's] first "Civil Justice Fellow" when he began work on his book [*Liability*]. He will be taking the next few months to complete the manuscript of what we expect will be the most forceful and lucid argument yet made for true tort reform. In addition to his stipend, we're also supplying him with paralegal assistance and editorial guidance from Walter Olson.[326]

C. The Public Relations Juggernaut of the Manhattan Institute

The Manhattan Institute has long prided itself as much on its ability to promote views as to incubate them. Indeed, it sees the former as more important than the latter. In the view of the Manhattan Institute, the popularity of a given idea is more a reflection of the quality and quantity of the public relations efforts mounted *after* publication than any efforts at research, analysis, and writing by the author *before* publication.[327]

Life, Kemper, Marsh & McLennan, Nationwide Insurance, SAFECO, Selective Insurance, and Transamerica); 16 of the nation's biggest chemical and pharmaceutical manufacturers (Abbott Laboratories, AMOCO, ARCO, Bristol Myers-Squibb, Dow Chemical, Eli Lilly, Exxon, Johnson & Johnson, Merck, Mobil, Monsanto, Pfizer, SmithKline Beecham, Texaco, Union Carbide, and Upjohn); and 21 of the nation's wealthiest industrial manufacturers (including Alcoa, American Home Products, Ameritech, Anheuser-Busch, Boeing, Coca-Cola, Cooper Industries, Conoco, General Dynamics, General Electric, B.F. Goodrich, W.R. Grace, Honeywell, IBM, Litton Industries, PepsiCo, Philip Morris, RJR Nabisco, Rockwell International, TRW, and Westinghouse). *Id.* at 8.

Over the years, the overall budget for the Manhattan Institute has grown apace. Originally named the International Center for Economic Studies, *see supra* note 321, it began operations with a budget of $125,000. *See* SIDNEY BLUMENTHAL, THE RISE OF THE COUNTER-ESTABLISHMENT: FROM CONSERVATIVE IDEOLOGY TO POLITICAL POWER 294 (1986) (noting that growth from initial budget due to private corporate contributions created substantial political power); JOSEPH G. PESCHEK, POLICY-PLANNING ORGANIZATIONS: ELITE AGENDAS AND AMERICA'S RIGHTWARD TURN 63 (1987) (stating amount of growth of several policy planning organizations and noting conservative influence exerted by large corporate contributions). By 1989, total contributions had grown to $2,113,000, 41% of which came from conservative and/or corporate foundations such as the John M. Olin Foundation, Sarah Scaife Foundation, Lynde and Harry Bradley Foundation, J.M. Foundation, Smith Richardson Foundation, and Starr Foundation. TEN YEAR REVIEW, *supra* note 49, at 20-22. Thirty-three percent came from Fortune 500 corporations, chiefly insurance companies and pharmaceutical and chemical manufacturers, including $50,000-plus each from Aetna, State Farm Insurance, Citicorp, and Chase Manhattan Bank; $15,000-plus each from Prudential, Exxon, RJR Nabisco, Philip Morris, Bristol-Myers Squibb, Pfizer, Procter & Gamble, and UPS; and $5,000-plus each from Abbott Laboratories, Alcoa, American Home Products, Amoco, Boeing, Chrysler, Chubb, CIGNA, CNA, Continental Corporation, Dow Chemical, Dupont, FMC, Ford, General Electric, General Reinsurance, Hill & Knowlton, Household International, Johnson & Johnson, Merck, Milliken & Co., Reliance Group, Royal Insurance, Sears, Roebuck, J & W Seligman, SmithKline Beecham, U.S. Trust, Union Carbide, and Xerox. *Id.* at 21, 23.

326. Hammett Memorandum, *supra* note 324, at 1.

327. *See* MANHATTAN INST. FOR POLICY RESEARCH, WINTER REPORT 1991-1992, at 7 (1992) [hereinafter WINTER REPORT] (acknowledging that "[c]ommissioning a work, supporting it, and finding a publishing outlet are only part of what the Institute does, however; making sure

The Manhattan Institute's approach can be gleaned from documents that it has released over the past several years, some of which are publicly available and some of which the author obtained from recipients of periodic fundraising newsletters distributed by the Manhattan Institute.[328] The recent "Mission Statement and Overview" of the Manhattan Institute's Judicial Studies Program candidly proclaims how important it is to mold the media to the proper pro-tort reform views; indeed, this newsletter provides a prescription for just how to do so:

> Journalists need copy, and it's an established fact that over time they'll "bend" in the direction in which it flows. For that reason it is imperative that a steady stream of *understandable* research, analysis and commentary supporting the need for liability reform be produced. If, sometime during the present decade, a consensus emerges in favor of serious judicial reform, it will be because millions of minds have been changed, and only one institution is powerful enough to bring that about: the combined force of the nation's print and broadcast media . . . .[329]

Of course, the Manhattan Institute's objective is to change the minds of the public and mold that consensus by providing this "steady stream" of ideas to the media. To that end, the long-tested techniques developed by Madison Avenue, including the market-testing of ideas,[330] are used by the Manhattan Institute to sell ideas,

---

a book reaches as wide an audience as possible is perhaps the most important service we provide"). A primary focus on the marketing of ideas is not unique to the operations of the Manhattan Institute, among conservative organizations. As William Baroody, Jr., president of the conservative American Enterprise Institute, put it: " 'I make no bones about marketing. . . . We pay as much attention to the dissemination of product as to the content. . . . We hire ghost-writers for scholars to produce op-ed articles that are sent to one hundred and one cooperating newspapers—three pieces every two weeks.' " BLUMENTHAL, *supra* note 325, at 44 (quoting William Baroody, Jr.). Or as Edwin J. Feulner, Jr., president of the Heritage Foundation, explained: " 'Ideas are always ahead of the politicians. Ideas are refined through organizations like ours.' " *Id.* at 36 (quoting Edwin J. Feulner, Jr.). According to Feulner, whose Heritage Foundation's aggressive public relations strategy set the standard for (and helped to spawn) other think tanks and established its preeminent influence during the Reagan and Bush administrations, "It doesn't matter how many books and studies you produce. You've got to market your product, get it off the bookshelf." Carol Matlack, *Marketing Ideas*, NAT'L J., June 22, 1991, at 1552, 1552-53.

328. *See, e.g.*, MISSION STATEMENT, *supra* note 38; TEN YEAR REVIEW, *supra* note 49; LIABILITY CRISIS, *supra* note 322; WINTER REPORT, *supra* note 327; Hammett Memorandum, *supra* note 324.

329. MISSION STATEMENT, *supra* note 38, at 2.

330. *See* TEN YEAR REVIEW, *supra* note 49, at 4 (reviewing first decade of Manhattan Institute's existence).

> Sustaining a flow of fresh and innovative ideas is crucial for democratic societies, whose strength is derived from open and honest discussion. Before ideas are ready for the political arena, however, they must be tested in the crucible of informed opinion. . . . Since 1980 the Manhattan Institute has provided a setting for the introduction and discussion of ideas that many consider to be the best intellectual testing ground in the world—the Manhattan Forum. Designed to take advantage of New

shape public perceptions of a "legal system in crisis," and manufacture a supposedly spontaneous public outcry about the need to reform the legal system. In November 1992, the Manhattan Institute published a five-year summary of the Judicial Studies Program with a forward-looking "Mission Statement and Overview."[331] This publication both highlighted the Program's accomplishments and offered a coherent philosophy for continuing those achievements in the future: the continued promotion of writers such as Peter Huber.

According to the Manhattan Institute, the key to both achieving its past successes and attaining its future goals lies in its ability to "set[] the terms of the debate."[332] "The rhetoric of liability reform must incorporate transcending concepts, like consumer choice, fairness, and equity, while simultaneously pointing out the opposition's indifference or opposition to these values."[333] An earlier promotional brochure vaunted the "Manhattan Institute Approach" in shaping public debate[334]—an approach that easily explains how a book as inadequate as *Galileo's Revenge* could nonetheless enjoy such favorable publicity. What is critical, according to the Manhattan Institute, is not the research and analysis undertaken by an author, or the data discovered and ideas developed by an author; instead,

> [An author's real] "Moment of Truth" . . . has just begun when his

---

> York's unique mix of opinion molders and leaders from the business, communications, and non-profit worlds, these gatherings have given wind to countless new ideas and original research findings.

Id.

331. MISSION STATEMENT, *supra* note 38, at 1-6.

332. MISSION STATEMENT, *supra* note 38, at 1.

333. MISSION STATEMENT, *supra* note 38, at 1-2 (describing how Manhattan Institute defines its marketing strategy). The section on "Setting the Terms of the Debate" further explained the Manhattan Institute's marketing strategy, including the tactic of piggy-backing tort reform "rhetoric" onto current populist themes:

> Across a wide cultural horizon today powerful new ideas like choice, empowerment, and voluntarism are capturing the public imagination; they can and should be brought into the debate about legal reform. . . .
>
> . . . .
>
> For tort reform to maintain its rightful place as an issue of national interest and debate, it must broaden its appeal and move beyond its confrontational demeanor (e.g., lawyer-bashing). . . .
>
> . . . .
>
> Advocates of liability reform must link their arguments to a broader *agenda for the nineties*, by showing how consumers and taxpayers are, ultimately, in the same boat with manufacturers, service providers and insurers. . . . Such a "linkage" strategy would engage the following elements: The Financial Community . . . The Political Community . . . The Medical/Scientific Community . . . The Research/Academic Community . . . Professional Organizations . . . Civil Libertarians . . . [and] The Grass Roots-Consumer groups . . . .

Id. at 1-4.

334. *See* MANHATTAN INST. FOR POLICY RESEARCH, THE MANHATTAN INSTITUTE APPROACH 1 (1987) (on file with *The American University Law Review*) (explaining Manhattan Institute's philosophy and approach to informing the media).

> or her book finally gets published. That is when it enters the critical process that will determine which, if any, of its ideas will endure. The Manhattan Institute has provided over three dozen authors of serious books an opportunity to present their ideas to a diverse, well-informed, and often critical, New York audience. Because of the caliber of our audiences, and the large number of writers, producers and reviewers attracted, a Manhattan Forum can often be the single most important factor in determining a book's acceptance and impact.[335]

In another fund-raising letter to corporate executives, President Hammett further explicated the Manhattan Institute Approach:

> The strategy of the Judicial Studies Program centers on sponsoring the writing of first-rate books on civil justice reform. With book in hand, the Program then works to bring the ideas to a wide audience of specialists and lay persons through an imaginative promotion campaign. Briefly stated, [Judicial Studies Program] efforts are divided into two main areas: (1) *The Litigation Explosion* . . . [and] (2) *Science and Law* . . . . As to promotion, both projects present their ideas to popular and specialist audiences through a system of seminars, lectures and published articles. The Institute sponsors speaking engagements, regional workshops and seminars for judges and policy makers throughout the country. "Civil Justice Memos" are widely disseminated to judges and law professors as well as to business and government leaders. And, of course, Mr. Olson's and Mr. Huber's frequent media appearances encourage the circulation of ideas.[336]

The promotion of Manhattan Institute ideas, and specifically the promotion of Huber's work, is also fostered through Manhattan Institute mailings, video broadcasts, and the like.[337] Two techniques have been particularly effective. The first technique might be called,

---

335. *Id.* at 2.

336. Fundraising Letter, *supra* note 39, at 2-3. From January 1986 through May 1989, the Judicial Studies Program sponsored 23 conferences, forums, workshops, and judicial seminars on civil justice reform. TEN YEAR REVIEW, *supra* note 49, at 15. The 10 judicial seminars were chaired by leading conservative judges such as Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit, and Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. *Id.*

337. For example, "the Manhattan Institute used $200,000 in corporate and individual contributions to produce what [Manhattan] Institute President William Hammett calls 'the documentary' to bring the issue [of tort reform] before the public." Saundra Torry, *Walter Cronkite Video Helps Stir Up Debate over Tort Reform*, WASH. POST, Sept. 14, 1992, at F5. The video, which stars Peter Huber and is narrated by retired CBS anchorman Walter Cronkite,

> brings together an array of influential spokesmen, including former surgeon general C. Everett Koop and Atlanta Mayor Maynard Jackson. [For example, an] Illinois businessman tells a horror story about a $5 million judgment against his company. The video doesn't say so, but the company is a subsidiary of Cooper Industries, Inc., whose foundation donated $50,000 to make the video.

Id.

for lack of a more descriptive phrase, "creating a chain reaction"—a process by which positive testimonials written by favorably inclined book reviewers are not only provided to potential contributors, but are also furnished to other potential reviewers, thereby encouraging them to write equally glowing assessments.[338] This technique perhaps explains how a book as demonstrably bad as *Galileo's Revenge* has received book reviews that have been nearly unanimously favorable.

The second technique is similar to the first. Whereas sowing enthusiastic book reviews in order to reap additional approving reviews relies on a network of like-minded tort reformers to write the initial reviews, attaining a critical mass of media interest and opinion leader support at conferences, seminars, and lectures depends on finding friendly audiences. The Manhattan Institute's boast that Huber and company regularly participate in academic conferences is accurate—as far as it goes. What the Manhattan Institute neglects to mention, however, is that Huber only infrequently appears outside the friendly confines of programs hosted by tort reform organizations or by conservative think tanks and foundations.[339] Thus, Huber regularly appears on programs sponsored by, or has his books and videotape sold through the offices of, allied associations like the American Tort Reform Association,[340] the Products Liability Coordinating Committee,[341] the Insurance Information Institute,[342] the Heritage Foundation, the American Enterprise Institute, and the Federalist Society.[343]

---

338. For example, for the stated purpose of "informing and broadening public debate," the Manhattan Institute sent out, shortly after *Galileo's Revenge* was published (but before most reviews were written), a "packet [that] contain[ed] some of the early [and positive] press clippings generated by the book." MANHATTAN INST. FOR POLICY RESEARCH, MANHATTAN INSTITUTE PRESS PACKET 1 (Oct. 28, 1991) (on file with *The American University Law Review*).

339. Huber occasionally does appear in such neutral venues as *Face the Nation* and the *McNeil/Lehrer NewsHour*. *See Peter Huber To Address Nat'l Governors' Ass'n*, PR Newswire, July 26, 1989, *available in* LEXIS, Nexis Library, Omni File (reporting that Huber has appeared in neutral venues).

340. *See* AMERICAN TORT REFORM ASSOC., LAWSUIT ABUSE 1 (1992) (on file with *The American University Law Review*) (advertising Peter Huber/Walter Cronkite videotape, *Liability: Injustice for All*).

341. *See Peter Huber To Address Nat'l Governors' Ass'n*, *supra* note 339 (announcing that Huber would present address on "Product Liability & International Competitiveness" at meeting of National Governors' Association in Chicago on July 31, 1989 and advising persons interested in more information to contact Product Liability Coordinating Committee).

342. *See* Mark A. Hofmann, *III To View Industry's Public Image*, BUS. INS., Jan. 20, 1992, at 27, 27 (reporting that Insurance Information Institute's (III) outgoing chairman, Gerald A. Isom, announced "plans this year to join in the communications efforts of the Manhattan Institute . . . and the American Tort Reform Association to make the public aware of the 'intolerable costs' of the civil justice system"); Laura Mazzuca, *Huber Trashes "Junk Science,"* BUS. INS., May 18, 1992, at 60, 60 (discussing Huber's speech at National Association of Insurance Brokers conference).

343. *See Hatch, Strossen, Bork, Kennedy Among Headliners at Fifth Annual Federalist Society Con-*

Huber bestrides that conservative sphere of influence like a colossus, but he rarely ventures outside it. Nor need he, as the network is comprised of more than one hundred tort reform groups, civil justice reform organizations, multi-issue conservative think tanks, and conservative public interest law firms, all supported by conservative foundations, industry and insurance trade associations, as well as individual corporations; the resources made available in that network to promote books such as Huber's are staggering.[344] Huber's suc-

---

vention, U.S. Newswire, Sept. 13, 1991, *available in* LEXIS, Nexis Library, Omni File (announcing that Huber would be luncheon speaker on September 14, 1991).

344. The network of single-issue tort reform organizations includes: the America Tort Reform Association; Citizen's Coalition for Truth in Science; Citizens for Civil Justice Reform; Coalition for Uniform Product Liability Reform; Lawyers for Civil Justice; Product Liability Advisory Board; Product Liability Advisory Council; Product Liability Alliance; Product Liability Information Bureau; and Product Liability Coordinating Committee. These single-issue tort reform groups are aided by such multi-issue think tanks as the Manhattan Institute; American Enterprise Institute; American Legislative Exchange Council; Brookings Institution; Cato Institute; Center for Individual Rights; Center for Judicial Studies; Competitive Enterprise Institute; Federalist Society; Heartland Institute; and the Heritage Foundation. Multi-issue conservative public interest law firms include the National Legal Center for the Public Interest; American Legal Foundation; Capital Legal Foundation; Gulf & Great Plains Legal Foundation; Landmark Legal Foundation; Mid-America Legal Foundation; Mid-Atlantic Legal Foundation; Mountain States Legal Foundation; New England Legal Foundation; Pacific Legal Foundation; Southeastern Legal Foundation; and the Washington Legal Foundation.

Both the single-issue tort reform groups and the multi-issue conservative think tanks are supported by contributions and sometimes the separate efforts of industry and insurance trade associations, including: Alliance of American Insurers; American Council of Life Insurers; American Corporate Counsel Association; American Insurance Association; American Medical Association; American Mining Congress; Business Roundtable; Committee for Economic Development; Conference Board; Chemical Manufacturers Association; Defense Research Institute; Health Insurance Association of America; Insurance Information Institute; Insurance Research Council; International Association of Defense Council; National Association of Manufacturers; National Association of Mutual Insurance Companies; National Association of Wholesalers-Distributors; National Tool Builders Association; Pharmaceutical Manufacturers Association; Risk & Insurance Management Society; and the U.S. Chamber of Commerce. Corporate foundations include the following: Bradley Foundation; Broyhill Foundation; Coors Foundation; Deer Creek Foundation; Fund for American Renaissance; Health Education Foundation; J.M. Foundation; Lilly Endowment; Murdock Foundation; John M. Olin Foundation; Pew Charitable Trust; Richardson Foundation; Sarah Scaife Foundation; Starr Foundation; and Walker Foundation. Support also derives from corporations and insurance companies far too numerous to mention. *See generally* BLUMENTHAL, *supra* note 325, at 32-40 (discussing evolution of conservative ideology); JOHN S. SALOMA III, OMINOUS POLITICS: THE NEW CONSERVATIVE LABYRINTH 7-23 (1984) (tracing buildup of conservative organizations and effect on political system); JAMES A. SMITH, THE IDEA BROKERS: THINK TANKS AND THE NEW POLICY ELITE 202-03, 207, 214-15 (1991) (explaining think tanks' efforts to define conservative ideology).

For a discussion of the revolving door between the aforementioned groups and the Reagan and Bush administrations, see W. John Moore, *Keeping the Faith*, 23 NAT'L J. 734, 735-36 (1991) (reporting that ex-officials from Reagan Justice Department "network" in and through such groups as Federalist Society, Washington Legal Foundation, Ethics and Public Policy Center, Cato Institute, Center for Law & Democracy at Free Congress Research and Education Foundation, Heritage Foundation, and Landmark Legal Center for Civil Rights). For a discussion of how Fortune 500 companies such as Exxon and General Motors created, organized, and financed a nationwide network of conservative, pro-business public interest law firms, including the Pacific, Mountain States, Mid-America, Gulf Coast and Great Plains, Mid-Atlantic, Southeastern, New England, and Capital Legal Foundations and the National Legal

cess thus reflects not only the agenda and resources of his employer, the Manhattan Institute, but also the place that it holds in the universe of enormously influential conservative organizations—the last subject for brief exploration in this Article. Huber's book can be fully understood only by considering it as a product of an aggressive revival of corporate activism dating back three decades.

D. The Veiled Origins and Broad Influence of the Manhattan Institute

Although the Manhattan Institute is loathe to admit it now, its central founder was a protean figure of the American right, William J. Casey.[345] Casey, who was present at the creation of the Office of Special Services during World War II and who presided over the rebirth of the CIA as Ronald Reagan's Director of Central Intelligence, established the Manhattan Institute in 1978 under the name "The International Center for Economic Policy Studies"[346] just before he became director of Reagan's 1980 election campaign.

Center for the Public Interest, see Oliver A. Houck, *With Charity for All*, 93 YALE L. J. 1415, 1456-1512 (1984) (noting that these firms promoted "New Right" philosophy in judicial system). For a discussion of the influence of such groups as the Federalist Society at the nation's law schools, see Neil A. Lewis, *Conservative 'Outsiders' Now at Hub of Power*, N.Y. TIMES, Mar. 29, 1991, at B16 (reporting that during 1980s, Federalist Society grew from isolated fringe groups at few law schools to organization with more than 3000 faculty and student members at 120 law schools and annual "budget of more than $700,000, largely from conservative groups like the *John M. Olin Foundation* and the *Bradley Foundation*"). According to Lewis, "Many former student members hold important posts in the Bush Administration and several others . . . are junior law professors." *Id.* In the words of Harvard Law School Professor Christopher Edley, Jr., " 'They're practically running the country.' " *Id.*

345. *See* BLUMENTHAL, *supra* note 325, at 206 (noting William Casey's "deep roots" in conservative movement); SMITH, *supra* note 344, at 285 (noting that William Casey founded International Center for Economic Policy Studies that was renamed in 1981 and is now called Manhattan Institute for Policy Research); Marvin Gottlieb, *Conservative Policy Unit Takes Aim at New York*, N.Y. TIMES, May 5, 1986, at B4 (noting that Casey founded Manhattan Institute); *Think-Tanks: The Carousels of Power*, ECONOMIST, May 25-31, 1991, at 23, 24 (noting that Casey created Manhattan Institute for Policy Research and that think tanks developed prevailing concepts of domestic welfare policy); *see also* Keith Henderson, *Think Tanks Spread Free-Market Ideas Worldwide*, CHRISTIAN SCI. MONITOR, May 3, 1985, at 23 (recognizing that Casey, abetted by British citizen Sir Antony G.A. Fisher, was progenitor of nearly three dozen conservative think tanks and foundations around the globe); John A. May, *A Quiet Briton Whose Think Tanks Back a Free Market*, CHRISTIAN SCI. MONITOR, Jan. 19, 1984, at 9 (acknowledging Fisher's influence in founding of Manhattan Institute).

Over the years, Casey and Fisher have been joined by other leading members of the conservative "Counter-Establishment," including: Edwin J. Feulner, Jr. (head of the Heritage Foundation, another conservative think tank); William E. Simon (former Nixon Treasury Secretary, chair of the Institute for Educational Affairs, and president of the John M. Olin Foundation, which is the biggest financial contributor to conservative groups and causes); R. Randolph Richardson (of the Richardson Foundation); J. Peter Grace (Grace Shipping); corporate raider T. Boone Pickens, Jr. (Mesa Petroleum); Ronald S. Lauder (heir to the Revlon fortune); financier Shelby Cullom Davis; Lewis E. Lehrman (director of Morgan Stanley & Co.); Walter Wriston (chair of Citicorp); Nathan Glazer (Harvard professor and neoconservative guru); and columnist Ernest van den Haag. TEN YEAR REVIEW, *supra* note 49, at 24.

346. The International Center for Economic Policy Studies changed its name to the Manhattan Institute for Policy Research in 1981, after Casey took over at the CIA, in order "to reflect an expanded policy agenda." HISTORY AND BACKGROUND, *supra* note 321, at 1.

The Manhattan Institute's reticence to acknowledge its paternity[347] presumably stems from the current perception of Casey as "the manipulative puppet master of the Reagan Administration" who took "so many unresolved mysteries to the grave."[348] Perhaps Casey's reputation for "operat[ing] in a world of manipulated fact and disinformation, a place where candor is rarely considered a virtue,"[349] strikes too close to home for the Manhattan Institute, given some of its chosen methods for influencing public opinion.

In contrast to its veiled origins, the Manhattan Institute makes no secret of its membership in a massive network of conservative organizations that was self-consciously created by the legion of frustrated and wealthy Goldwater supporters in the aftermath of Goldwater's failed 1964 bid for the presidency.[350] Why, these conservatives asked, do "bad" (meaning liberal) ideas triumph over "good" (meaning conservative) ones? The answer, they decided, was that liberals controlled the dominant think tanks of that day, such as the Brookings Institution. Therefore, the liberals dominated the nation's media and the nation's thoughts.[351] These wealthy conservatives set about to build a parallel universe of think tanks, first to match, and then to overwhelm the liberal intellectual opposition.[352] The election of Ronald Reagan marked the triumph

---

347. The most the Manhattan Institute says nowadays about Casey is that he was an emeritus trustee. TEN YEAR REVIEW, *supra* note 49, at 24.

348. Daniel Schorr, *Artful Dodger of the CIA; Casey: From the OSS to the CIA*, L.A. TIMES, Oct. 28, 1990, (Book Review) at 8; *see* JOSEPH E. PERSICO, CASEY 561 (1990) (noting Casey's "lifelong reputation for wheeling and dealing").

349. Ed Magnuson, *Death of an Expert Witness; William Joseph Casey: 1913-1987*, TIME, May 18, 1987, at 37, 37.

350. *See* RICHARD REEVES, THE REAGAN DETOUR 23-32 (1985) (crediting Ronald Reagan as leader and spokesman of conservative institutions and movement); SALOMA, *supra* note 344, at 3-23 (tracing growth in 1980s of conservative think tanks); SMITH, *supra* note 344, at 167-213 (discussing conservative counterestablishment movement and origin of think tanks); *see also* BLUMENTHAL, *supra* note 325, at 4 (depicting rise of conservative "counterestablishment"). Blumenthal writes:

> To counteract th[e] Liberal Establishment, which conservatives believed encompassed both political parties, they deliberately created the Counter-Establishment. By constructing their own establishment, piece by piece, they hoped to supplant the liberals. Their version of [the] Brookings [Institution]—the American Enterprise Institute—would be bigger and better. The [John M.] Olin Foundation would give millions, with greater effectiveness than Ford. The editorial pages of the Wall Street Journal would set the agenda with more prescience than The New York Times. And although the Washington Times, funded by Reverend Sun Myung Moon, wasn't a formidable adversary for the Washington Post, a new generation of advocacy journalists, planted in a host of newspapers, would begin to create an alternative presence.

BLUMENTHAL, *supra* note 325, at 4-5.

351. *See* M. STANTOR EVANS, THE LIBERAL ESTABLISHMENT 18 (1965) (noting general conservative belief in 1965 that "the [l]iberal [establishment] [was] . . . in control"). Evans asserted that the liberal establishment wielded power by controlling "the instruments of public scrutiny" and directing popular opinion. *Id.*

352. Richard Reeves noted:

of their strategy and the ascendancy of conservative views.[353] As the Manhattan Institute itself has boasted, "The Manhattan Institute was at the forefront of this movement."[354]

With the Manhattan Institute at its fore, the conservative movement has been very successful in promoting the views of pro-tort reform writers such as Huber and in obtaining wide attention for their ideas, even where those ideas leave much to be desired in terms of scholarship. In a recent article, Cornell law professors James A. Henderson, Jr. and Theodore Eisenberg attribute the declining fortunes endured by plaintiffs since 1979, which they describe as amounting to a "slaughter" since 1985,[355] partially to the extraordinary effectiveness of the public relations campaigns waged by tort reform groups like the Manhattan Institute's Judicial Studies Project.[356]

> In the twenty years from 1964 to 1984, the Capitol of the United States was surrounded, figuratively and literally, by dozens of conservative institutions staffed with aggressive scholars, researchers and pamphleteers proposing and refining ideas like tax reform, and deregulation, and aggressive international unilateralism. They pulled together and honed a coherent set of ideas, a view of America and the world that was persuasively articulated by Reagan.

REEVES, *supra* note 350, at 23-24.

353. *See, e.g.*, George H. Nash, *Completing the Revolution: Challenges for Conservatism After Reagan*, HERITAGE FOUND. POL'Y REV., Spring 1986, at 35, 35 (describing rise of conservative movement).

354. TEN YEAR REVIEW, *supra* note 49, at 1. At the end of its first decade, the Manhattan Institute observed:

> The past ten years have seen many old assumptions about the role of government turned upside down. The continuing revolution that began in the eighties owes much to pressures from technologies and a competitive world economy, but even more to a wave of fresh ideas that swept away the intellectual complacency of previous decades. Many of those ideas were promoted by a handful of independent research centers whose sole reason for being was to question established opinion.
>
> The Manhattan Institute was at the forefront of this movement . . . .

Id.; *see also* Gregg Easterbrook, *Ideas Move Nations*, ATLANTIC, Jan. 1986 at 66, 66 (noting think tanks' contribution to intellectual conservatism); William Safire, *Tanks for the Memories*, N.Y. TIMES, Sept. 1, 1986, at A23 ("In the past generation, political think tanks have done much to make conservatism a respectable and dynamic intellectual alternative to the liberalism that permeated academia from the New Deal through the Great Society.").

355. *See* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731, 770 (1992) (reporting that "[f]rom 1985 to the time of the most recently available data, the products battle has been a slaughter. Filings began to plummet; success rates continued to fall. Most measures of awards—means, expected returns, and sums—are down. Medians are equivocal."). For example, "[plaintiff] [s]uccess rates in published opinions fell from 56% in 1979 to 39% in 1989, a drop of 29%. At the federal district court level . . . plaintiff success rates fell from 41% in 1979 to 31% in 1989, a drop of 24%." *Id.* at 741.

These factual assessments are substantiated by a number of other studies, including SEAN F. MOONEY, CRISIS AND RECOVERY: A REVIEW OF BUSINESS LIABILITY INSURANCE IN THE 1980S (1992). For example, Dr. Mooney reports that whereas "[b]etween 1978 and 1985, paid claims for general liability insurance increased at an average annual rate of 21.1 percent . . . [p]aid claims for general liability increased at an average rate of 7.8 percent from 1986 to 1990 . . . considerably below the rate of 21.1 percent for the pre-crisis period from 1978 to 1985." *Id.* at 1, 5-23.

356. *See* Eisenburg & Henderson, *supra* note 355, at 778-79, 789-95 (discussing influence

Professors Henderson and Eisenberg explain how assiduously tort reform groups and their allies have influenced the public, including the nation's judiciary:

> Using every technique of modern media-shaping, tort reform groups sought to assure that the public believed that products liability law was the cause of this threat to our way of life. The message was carried, and is carried, through a variety of media: massive print media advertising campaigns; television appearances on "The Today Show," "Good Morning, America," and the "McNeil-Lehrer News Hour," purchased television time; and reports of surveys of business and public opinion.[357]

Henderson's and Eisenberg's conclusion suggests that the contest for public opinion, and for the support of the nation's judges, law

---

of tort reform movement). After careful examination of the possible reasons for this "slaughter," Eisenberg and Henderson discount both geographical variations and differences in categories of products as possible causes for the dramatic decline in plaintiffs' fortunes. *Id.* at 772-74, 778-79. They similarly scrutinize, and likewise reject, the enactment of civil justice reform *statutes* as a dispositive factor. *Id.* at 774-78. Thus, "the pro-defendant opinion trend is not isolated to states in which reform was enacted during the relevant period." *Id.* at 776. Professors Henderson and Eisenberg also explore and determine that "shifts in accident trends," "changes in plaintiffs' propensity to make claims," and "changes in post-claim, pre-filing settlement behavior" cannot satisfactorily explain the observed patterns. *Id.* at 748-60. Interestingly, the authors also reject the notion that the pro-defendant trend since 1979 has simply been the consequence of Reagan-Bush appointments to the federal bench. Accordingly:

> [O]ne explanation frequently mentioned is the growing influence of President Reagan's judicial appointees. . . . [W]e think the explanation falters for two reasons.
>
> First, although our district court non-opinion data are all federal, the published opinion data are dominated by state court opinions. The trend in state appellate opinions is very similar to the trend in federal appellate opinions. To the extent appellate judges shape the law, the growing influence of Reagan's federal appellate appointees has not led the pro-defendant trend. It seems more likely that the federal district court judges responded to stated changes in legal doctrine, and that the pro-defendant thrust of those changes comes from state judges with no direct connection to Reagan.
>
> Second, the litmus test issues for Reagan judges have been public law issues such as abortion, civil rights, and affirmative action. Potential appointees' views of state products liability law have not been mentioned as a prominent feature of any president's judicial selection process. Although appointees with conservative views on public law issues might be expected to be hostile to products liability, the subordinate role of products liability in the selection process might not produce a noticeable trend in decisions.

Id. at 790-91 (footnotes omitted).

357. Eisenberg & Henderson, *supra* note 355, at 793 (footnotes omitted). Tort reform groups openly acknowledge the dimensions of their advertising campaign and proudly boast of its achievements. For example, the American Tort Reform Association (ATRA) announced that its " 'LAWSUIT ABUSE! Guess who picks up the tab?' communication campaign has resulted in orders of more than 55,000 information kits, 300,000 posters, 200,000 brochures and more than 100,000 bumper stickers." ATRA Press Release, June 5, 1992 (on file with *The American University Law Review*). ATRA also claims that these sorts of advertisements have produced "a dramatic and measurable change in the outcome of civil trials" in at least one area, the Rio Grande Valley of Texas, where they have been widely distributed. *Tort Reformers Say Advertising Pays, Even in Texas*, LIABILITY WK., Feb. 10, 1992, at 1 (quoting ATRA President Martin Connor).

professors, and law students, may already have been won by the tort reformers:

> Even if subsequent analyses suggested other possible causes of the insurance crisis,[358] the public's mind had been shaped. The intricacies of the insurance cycle and insurance company investment returns could not be grasped as easily, nor were they as forcefully marketed, as was the idea that products liability was the cause of the insurance crisis. Many reform statutes were enacted; many others were defeated after vigorous efforts to secure enactment. However, products liability reformers apparently succeeded in the larger legislature of public opinion, even though they failed to secure passage of anywhere near all the legislation they sought. Among those apparently influenced were the appellate and district court judges who, at least since 1985, have increasingly favored defendants. These judges ultimately underlie the quiet revolution, and they have not been bounded by state lines, reform status, or product categories.[359]

---

358. Eisenberg and Henderson convey that "[t]his is not the place to decide whether there was a 1980s insurance crisis or whether the products liability system had a substantial role in causing it. Although evidence links tort reform and declining insurance rates, one also has reason to be skeptical." Eisenberg & Henderson, *supra* note 355, at 792.

359. Eisenberg & Henderson, *supra* note 355, at 794 (footnote omitted). Stated differently:

> The 1980s pro-defendant movement is not the result of sharp reversals in a few jurisdictions; rather, it is truly national, with most states showing defendant success rate increases in the second half of the 1980s. Nor did the national trend result from shifts in a few important products categories. As best we can tell, the trend spans nearly all nonasbestos products lines. Legislative reforms do appear to have contributed; but even in non-reform states, the success rate of products cases has declined. A widespread, independent shift in judicial attitudes continues to be the likely major source of the decline.
>
> This general shift in attitude suggests that the tort reform movement of the 1970s and 1980s may have succeeded in a broader sense even if it failed to achieve many of its more specific legislative goals.

Id. at 734.

All three strands of the Henderson/Eisenberg thesis—first, that plaintiffs' fortunes have declined since 1985; second, that the decline is due to changed judicial attitudes; and third, that the attitudes of judges have been changed by a corporate public relations campaign targeted at the public in general and at judges in particular—are supported by Dean Teresa M. Schwartz. Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303 (1991-1992). First, Dean Schwartz notes that a review of leading cases in various areas of tort law reveals that courts have embarked on a new, pro-defendant path in recent years. *Id.* at 318-33. As one example of this pro-defendant retrenchment, she notes that courts, particularly well-respected state supreme courts like those of New Jersey, New York, and California that had a long tradition of being pro-plaintiff, are today consistently "rejecting [liability-expanding] claims that would open whole new categories of claims." *Id.* at 318.

Second, new judicial attitudes are reflected in the rationales for these anti-plaintiff decisions, as well as in the decisions themselves. *Id.* at 323-33. Thus, judges are increasingly "seeing adverse consequences from the product liability system" and are looking for "a more limited role for [themselves,]" as exemplified by increasing deference to both legislatures and regulatory agencies. *Id.* at 324-33. Third, Dean Schwartz, like Professors Henderson and Eisenberg, identifies one possible reason for this judicial shift in attitude—extensive corporate media-shaping:

According to a recently published research monograph by two University of Delaware sociologists, Valerie P. Hans and William F. Lofquist, the same tidal wave of civil justice reform advertising that has transformed judicial attitudes has also changed juror attitudes previously regarded as pro-plaintiff and anti-corporate.[360] Today, according to Professors Hans and Lofquist:

> Rather than revealing jurors willing or eager to impose on business the costs of plaintiffs' injuries, our findings show that jurors were suspicious of the legitimacy of plaintiffs' claims and concerned about the personal and social costs of large jury awards. Despite insistence on product safety and high expectations of business, jurors were generally favorable toward business, skeptical more about the profit motives of individual plaintiffs than of business defendants, and committed to holding down awards.[361]

> Critics of the product liability system have been highly visible and effective. They have come from all quarters—business, government, and academia. . . . The business interests pushing for product liability reform are well organized and have committed substantial resources to promote their aims. They have gathered together sizeable coalitions of manufacturers and insurers to work for reform. They have been able to fund studies of the system that support their views and to get the results of their studies into the news media . . . . Tort scholarship, once at the forefront of efforts to expand the product liability law, now largely supports the constriction of the product liability system. . . . [T]here has been nearly a "consensus" in academic writing that the expansion of the product liability system, "whatever its magnitude, has generated much more harm than good."

Id. at 306-08 (citations omitted). According to Dean Schwartz, the "widespread criticism of the product liability system . . . has begun to have an impact on the judiciary." *Id.* at 304. Thus, judges often parrot this propaganda, repeating civil justice reform "horror stories" line by line:

> [Judicial] [o]pinions that reject new liability expanding claims often sound the themes of the tort system's critics, e.g., that the system is out of control, imposes burdensome costs on businesses and consumers, deters manufacturers from marketing worthwhile products and from research and development, and makes U.S. products less competitive in world markets.

Id. at 304-05.

360. *See* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 108 (1992) (reporting that survey of jurors in tort/business cases revealed skepticism of plaintiffs' claims and conservative approach to damages awards).

361. *Id.* at 93. Generally, "tort jurors had strong negative views about the frequency and legitimacy of civil lawsuits." *Id.* According to the survey, 83% of the tort jurors sampled either agreed or strongly agreed with the statement that "[t]here are far too many frivolous lawsuits today"; 81% agreed or strongly agreed with the proposition that "[p]eople are too quick to sue"; 39% agreed or strongly agreed with the assertion that "[t]he money awards that juries are awarding in civil cases are too large"; and 32% agreed or strongly agreed that "[t]he number of lawsuits show that our society is breaking down." *Id.* at 95.

On the other hand, "[c]ontrary to the skepticism shown plaintiffs, corporate defendants were typically not subjected to such vigorous scrutiny." *Id.* at 97. Hans and Lofquist "found little evidence of tough standards and punitiveness [by jurors] toward . . . corporation[s]." *Id.* at 100. They learned that most jurors evinced only "scattered concern about the profit motive causing business to cut corners." *Id.* at 104. Most jurors polled thought that an "organization's assets should not be and were not relevant to the liability and award decisions." *Id.* at 106. The study found that jurors' "comments derogating business were rare compared to the more frequent negative evaluations of the plaintiffs and their [putatively] mercenary motives."

Finally, Hans and Lofquist conclude that one force affecting the attitudes of jurors is "[t]he concerted efforts of business and insurance companies to foster perceptions of a litigation explosion."[362] Hans and Lofquist also surmise that the "litigation explosion rhetoric captured the public's (and jurors') attention because [such rhetoric] resonated strongly with pre-existing cultural standards of responsibility."[363]

Although any particular organization's importance to such concerted efforts is usually difficult to assess,[364] one indicator that the Manhattan Institute is a major player in the tort reform movement—and a notable outcome of that movement—is the prominence of its fellow Peter Huber. In 1986, leaders of the tort reform movement, who were clearly identified as partisan mouthpieces for corporate America, could herald Huber as something new under the sun, a thinker " 'untainted by any relationship with the manufacturers who are leading the fight for tort reform.' "[365] Seven years have passed, during which Huber has been continuously employed with the Manhattan Institute's Judicial Studies Program, helping to carry out its mandate to promote the civil justice reforms favored by the corpo-

---

Id. at 104. The numbers bear out their conclusions. Fifty-seven percent of the tort jurors sampled either agreed or strongly agreed with the statement that "[t]he threat of lawsuits is so prevalent today that it interferes with the development of new and useful products"; 51% agreed or strongly agreed with the view that "[b]ig business in this country is adequately concerned with the safety of its workers"; and 32% agreed or strongly agreed with the notion that "[t]he courts have meddled so much in the workplace that many businesses are not able to remain competitive." *Id.* at 99.

The survey results published by Hans and Lofquist are consistent with those reported earlier this year by The Roper Organization, Inc. *See To Sue or Not To Sue: Public Backs Liability Reform*, PUB. PULSE, Aug. 1991, at 6 (charting tort reform poll). According to the Roper poll, 70% of the persons surveyed agreed that "[l]awyers and law firms make much more money than they deserve"; 63% agreed that "[p]eople often start frivolous lawsuits because awards are so big and they have so little to lose"; only 40% of the people queried said that the major effect of liability suits is for "[v]ictims [to] get fair compensation for what they have suffered or lost"; and "two-thirds . . . support caps on compensation for pain and suffering, and half would limit amounts granted to cover lost income." *Id.*

362. Hans & Lofquist, *supra* note 360, at 109.

363. Hans & Lofquist, *supra* note 360, at 109.

364. This is so because while these conservative organizations collectively advocate conservative views, they individually compete with each other for corporate cash, making any single organization's claim that it is more important than any of the others somewhat suspect. For example, according to a recent fundraising letter from Manhattan Institute President William M.H. Hammett to corporate executives, contributing money to the Manhattan Institute is the wisest of investments. MISSION STATEMENT, *supra* note 38, at i ("Our books have been extremely influential; no less an authority than *The Washington Post* [has] hailed them as the driving force behind the [tort] reform movement (and dubbed their authors—Peter Huber and Walter Olson—the 'gurus' of tort reform).").

365. W. John Moore, *Free-Lance Critic Hits Shackles of Regulation*, 18 NAT'L J. 2797, 2797 (1986) (quoting Victor Schwartz as stating that Huber's 1985 tort reform article was "intellectual underpinning" of tort reform effort).

rate contributors of the Manhattan Institute.[366] Huber hardly seems "untainted" now.

Of course, the source of support for Huber's work, and the role this work plays in fulfilling the agenda of the Manhattan Institute and its contributors, do not, in and of themselves, render Huber's scholarship worthless. They do require that the informed reader keep in mind the potential source of bias and, in that light, carefully analyze all of Huber's statements and arguments. Likewise, given the massive promotion of Huber by the Manhattan Institute and its affiliated conservative organizations, the reader must not assume that the sheer notoriety of Huber's scholarship necessarily reflects real merit.

CONCLUSION

"A lie can be halfway round the world before the truth has got its boots on."[367] In the case of *Galileo's Revenge*, the massive promotion of the book and its author by the Manhattan Institute have fast outrun the flaws in the book and have long obscured the lack of merit in its analysis. Unlike the typical nonfiction book on policy issues that legitimately succeeds with a core synthesis of careful research and reporting of facts, the prominence of *Galileo's Revenge* springs chiefly from the perceived scholarly credentials of its author and the marketing of both the author and the book by the Manhattan Institute. The analysis in the book itself is mostly smoke and mirrors. Although best-selling books on policy issues in the legal arena and elsewhere often draw their share of critics who dispute the premises, logic, and conclusions of the arguments made, there are few cases in which readers who take the care to check the details are led to doubt the fundamental integrity of the book or of the author. *Galileo's Revenge* is one of these unfortunate cases; the long-overdue critical examination of the book offered in the preceding pages reveals disturbing problems.

In the subtitle to his book, and as a constant refrain throughout, Huber complains of "Junk Science in the Courtroom." Yet much of Huber's response to this supposed scourge can be most aptly described as "Junk Scholarship Outside the Courtroom." Huber's brand of "scholarship" in his legal writing employs distortion of the facts of cases and of the content of legal doctrines, including an ig-

366. *See supra* notes 38, 326 and accompanying text (discussing Huber's position with Manhattan Institute).

367. British Prime Minister James Callaghan, *quoted in* THE MACMILLAN DICTIONARY OF QUOTATIONS 349:9 (1989).

norance of controlling constitutional principles. If presented in a courtroom in the form of a legal brief, such analysis would likely trigger sanctions under rule 11 of the Federal Rules of Civil Procedure.[368] Likewise, such "scholarship" would be unacceptable if presented in a dissertation or research report. Major faults in *Galileo's Revenge* include, particularly: (1) Huber's studied concealment from readers that fully two-thirds of the supposed "cancer-by-pothole" cases he discusses involved uncontroversial claims merely that existing cancer was aggravated by trauma;[369] (2) Huber's failure to report that his sources on cerebral palsy severely criticize, or recant, the preliminary report of scientists whose views Huber claims have consensus status;[370] (3) Huber's attempt to portray the $5.1 million spermicide award in *Wells v. Ortho Pharmaceutical Corp.* as runaway junk science, by falsely claiming that it was a jury "verdict" based upon a single, tentative study, after which "the several authors of that study" unanimously retracted their earlier findings;[371] (4) Huber's rewriting of the legal history of the *Frye* rule;[372] (5) Huber's pretension that judges are free to enforce their own "rule of fact" unencumbered by the well-established Seventh Amendment right to jury trial;[373] and (6) Huber's general failure to cite opposing authority on central topics and to note obvious counter-examples to points he makes that are necessary to give a full and fair portrait of the topics.

Perhaps these and other faults in Huber's book could be defended by Huber or his supporters as instances not of willful distortion and

---

368. Rule 11 provides, in relevant part, that an attorney's filing of a legal document "constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." FED. R. CIV. P. 11. *See generally* 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1331-1339 (2d ed. 1990 & Supp. 1993) (discussing rule 11). Sanctions are common "when the party's position is groundless under existing law, there is a failure to cite controlling law, or there is a misstatement as to the content of existing law." *Id.* § 1335. Similarly, rule 11 also "prohibits a party from rewriting the factual record to reflect what it thinks should have occurred." Teamsters Local No. 579 v. B&M Transit, Inc., 882 F.2d 274, 280 (7th Cir. 1989); *see also* James E. Ward IV, Note, *Rule 11 and Factually Frivolous Claims—The Goal of Cost Minimization and the Client's Duty To Investigate*, 44 VAND. L. REV. 1165 (1991) (discussing merits of rule).

369. For a discussion of Huber's treatment of the cancer-by- pothole cases, see *supra* notes 106-25 and accompanying text.

370. For a discussion of Huber's conclusions regarding the relationship between obstetric malpractice and cerebral palsy, see *supra* notes 126-46 and accompanying text.

371. For a discussion of Huber's treatment of *Wells*, see *supra* notes 147-58 and accompanying text.

372. For a discussion of Huber's distortion of the *Frye* rule's history and current status, see *supra* notes 234-68 and accompanying text.

373. For a discussion of the role of the jury in resolving factual issues, see *supra* notes 268-312 and accompanying text.

evasion, but of "merely" shoddy research or negligent analysis—although this explanation would be groundless in response to a rule 11 motion for sanctions, for which "an empty head and a pure heart" is no excuse.[374] Even indulging this defense, Huber's many failures to meet minimal standards of trustworthiness imposed by the legal and scholarly communities should disqualify *Galileo's Revenge* as worthy of attention. Huber's work is so untrustworthy and incomplete that a serious reader would be forced to check every source and do background reading on every topic discussed before being able to evaluate the worth of Huber's analysis and proposals.

A reader who sets aside Huber's writings as not worth the effort will encounter no shortage of legitimate scholars on these subjects who enjoy strong reputations and whose writings are not plagued by the kinds of flaws that permeate Huber's work. For example, leading law-and-economics scholars from the University of Chicago, such as professors Richard A. Epstein and William M. Landes, in conjunction with their former colleague and now federal court of appeals Judge Richard A. Posner, have subjected the tort system to a rigorous and critical analysis, without resorting to factual or analytical misrepresentation, omission, or distortion.[375] Yale law professor George L. Priest also has authored a large body of tort law

---

374. *See* Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343 (1988).

375. Important writings of Professor Epstein include: Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975); Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49 (1979); Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982).

Important writings of Judge Posner include: RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Richard A. Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CAL. L. REV. 747 (1985); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

Important writings of Professor Landes and Judge Posner include: WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517 (1980); William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981); William M. Landes & Richard A. Posner, *Tort Law as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417 (1984).

work that has sometimes disparaged current doctrine,[376] as have the co-reporters for the American Law Institute's forthcoming *Restatement (Third) of Products Liability*, Cornell law professor James A. Henderson, Jr.[377] and Brooklyn law professor Aaron Twerski.[378] A wide variety of scholars have published careful evaluations of the current use of scientific and other expert testimony in our court system.[379]

---

376. *See, e.g.*, GEORGE L. PRIEST, THE RISE OF LAW AND ECONOMICS (1982); George L. Priest, *Compensation for Personal Injury in the United States*, *in* COMPENSATION FOR PERSONAL INJURY IN SWEDEN AND OTHER COUNTRIES (Carl Oldertz & Eva Tidefelt eds., 1988); George L. Priest, *The Disappearance of the Consumer from Modern Products Liability Law*, *in* THE FRONTIER OF RESEARCH IN THE CONSUMER INTEREST 771 (E. Scott Maynes ed. 1986); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981); George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193 (1987); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987); George L. Priest, *Modern Tort Law and the Current Insurance Crisis*, 96 YALE L.J. 1521 (1987); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982); George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497 (1987); George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989); George L. Priest, *The Best Evidence of the Effect of Products Liability Law on the Accident Rate: Reply*, 91 YALE L.J. 1386 (1982); George L. Priest, *The Insurance and Antitrust Suits and the Public Understanding of Insurance*, 63 TUL. L. REV. 999 (1989); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

377. *See, e.g.*, James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625 (1978); James A. Henderson, Jr., *Product Liability and the Passage of Time: The Imprisonment of Corporate Rationality*, 58 N.Y.U. L. REV. 735 (1983); James A. Henderson, Jr., *Renewed Judicial Controversy over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 MINN. L. REV. 773 (1979); James A. Henderson, Jr., *Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845 (1982).

378. *See, e.g.*, Aaron D. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297 (1977); Aaron D. Twerski, *National Product Liability Legislation: In Search for the Best of All Possible Worlds*, 18 IDAHO L. REV. 411 (1982); Aaron D. Twerski, *Old Wine in a New Flask—Restricting Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1 (1974); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982); Aaron D. Twerski, *The Many Faces of Misuse: An Inquiry into the Emerging Doctrine of Comparative Causation*, 29 MERCER L. REV. 403 (1978); Aaron D. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797 (1977).

379. *See, e.g.*, PAUL GIANNELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE (1986); JACK B. WEINSTEIN, ROLE OF EXPERT TESTIMONY AND NOVEL SCIENTIFIC EVIDENCE IN PROOF OF CAUSATION (1987); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992); Margaret A. Berger, *A Relevancy Approach to Novel Scientific Evidence*, 115 F.R.D. 89 (1987); Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595 (1988); Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577 (1986); Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985); Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact*, 7 HARV. ENVTL. L. REV. 429 (1983); E. Donald Elliot, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487 (1989); David L. Faigman, *Struggling To Stop the Flood of Unreliable Expert Testimony*, 76 MINN. L. REV. 877 (1992); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a*

Huber has published less work than any of these scholars who have analyzed the tort system, but paradoxically his fame among the informed public, fueled by the public relations juggernaut of the Manhattan Institute, seems to be greater than that of all these authors combined. It is sad to discover that a writer possessing the intellect, resources, and scholarly background of Peter Huber could publish a book so contemptuous of the reader and the truth. It is sadder still to see such work become the focus of attention that ought to be devoted to books and articles on the same topics written by legitimate scholars.

Some who have been closely associated with Huber have variously noted that he is a "polemicist" who, although he "writes a good jeremiad," also engages in a "slick sleight of hand" and reaches "large conclusions on the basis of partial or inadequate evidence."[380] After full review of *Galileo's Revenge* and the materials cited in many portions of it, Galileo would no doubt agree with such assessments. But the errors in Huber's factual description and legal analysis are so frequent and profound that Galileo would go further to repudiate Huber's book—on Huber's own terms—as "a catalog of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud."[381] Galileo would attribute the prominence of the book and its author to clever public relations, not merit, and would denigrate it as junk scholarship in search of "junk science." Such would be Galileo Galilei's retort to Peter Huber.

Half-Century Later, 80 COLUM. L. REV. 1197 (1980); Green, *supra* note 61, at 643; Edward J. Imwinkelreid, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577 (1984); Edward J. Imwinkelreid, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1 (1988); Edward J. Imwinkelreid, *The Standard for Admitting Scientific Evidence: A Critique from the Perspective of Juror Psychology*, 28 VILL. L. REV. 554 (1982-1983); Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986); Michael C. McCarthy, Note, *"Helpful" or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350 (1992).

380. *See supra* text accompanying notes 31, 94, 98.

381. HUBER, GALILEO'S REVENGE, *supra* note 5, at 3.